HINDU LAW

AS ADMINISTERED IN BRITISH INDIA.

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SECOND EDITION

REVISED

CALCUTTA AND SIMLA
THACKER, SPINK & CO.
LONDON: W. THACKER & CO., 2, CREED LANE, E.C.
1917

PRINTED BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

PREFACE TO SECOND EDITION.

I HAVE revised this book, have added a considerable amount of matter to it, and have brought it up to date.

I must again express my special and great obligation to the learned works of Sir Gooroo Dass Banerjee, Pundit Rajkumar Sarvadhikari, Dr. Jogendra Nath Bhattacharya, Sastri G. C. Sarkar, and Mr. J. C. Ghose. I have made frequent reference to them, and would recommend all who are interested in the subject to study those works at first hand. Without the help of works such as those it is impossible for one who is ignorant of Sanskrit to grasp sufficiently the real principles of Hindu law. I have also frequently referred to Mr. Mayne's well-known book on "Hindu Law."

E. J. TREVELYAN.

OXFORD,
August, 1917.

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Bom. L. R Bombay Law Reporter, 1899 to date. Bombay.
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Borr. Borrodaile's Reports of Civil Causes adjudged by the Court of Sudder Udalut for the Presidency of Bombay, 1800–1824. Bombay.
Boul. Boulnois Reports. Calcutta.

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HINDU LAW.

INTRODUCTION.

What is Hindu law?

HINDU law, as the term is understood by British administrators of justice, consists of the rules of law which are believed to have been generally binding on Hindus in matters to which they relate, at the time of the commencement of the British dominion, with such variations as have been made by British legislation, or by the established custom of any tribe, caste, family, or locality.

Sir H. S. Maine says: [1]—

"Indian [2] law may be in fact affirmed to consist of a very great number of local bodies of usage, and of one set of customs reduced to writing, pretending to be a diviner authority than the rest,[3] exercising consequently a great influence over them, and tending, if not checked, to absorb them. You must not understand that these bodies of custom are fundamentally distinct. They are all marked by the same general features; but there are considerable differences of detail."

To use the words of a learned Brahmin judge of the High Court of Bengal,[4] "Hindu law is a body of rules intimately mixed up with religion, and it was originally administered for the most part by private tribunals. The system was highly elastic, and had been gradually growing up by the assimilation of new usages and the modification of ancient text law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing into the hands of the English, and a degree of rigidity was given to it which it never before possessed." [5]

"There appears no trace of an intention on the part of the British

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[1] Maine's "Village Communities," pp. 52, 53.

[2] *I.e.* Hindu.

[3] This refers to the law of the Sastras, *post*, p. 10.

[4] Banerjee's "Law of Marriage," 3rd ed., p. 7.

[5] Sir H. S. Maine ("Village Communities," pp. 44, 45) says, "At the touch of the judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law books. Under the hand of the judges of the Sudder Courts, who had lived since their boyhood among the people of the country, the native rules hardened, and contracted a rigidity which they never had in real practice." See article by Mr. Justice Nair of Madras in *Contemporary Review* for May,

Government to arrest the development of Hindu law in its natural course. The intention seems to have been to secure to Hindus a faithful administration, under the control of the British Courts, of their own law in its true spirit—such an administration as similar tribunals of their own might have furnished. And the early British tribunals were accordingly assisted by officers learned in the *Shastras*,[1] who were doubtless assumed to be also acquainted with the law as actually received, and who could consequently keep the Courts in touch with the living law in its growth and development, and thus enable them to administer a law adapted to actual needs, instead of leaving them to piece out a skeleton from the dry bones of archaic texts."

"The *pundits*, however, failed to answer the purpose, and were displaced. Thenceforth the Courts have been driven to rely upon such assistance as could be obtained from their own experience and from formal evidence, together with such aid as could be obtained from writers of reputation, and at times have shown a tendency to fall back upon the bare texts of the *Shastras*, without assurance that those texts were practically adopted as part of the actual current law, when evidence on the point was not produced, as it seldom was." [2]

"Questions of Hindu law never have been nor will be decided with reference solely to what the law was when originally propounded by Manu, or the very earliest writers. The Hindu law which the Courts administer, and are bound to administer, is that which they, availing themselves of all the sources of information at their command, find to be the Hindu law as recognized and accepted and acted upon by the general body of Hindus for the time being." [3]

"The duty of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law." [4]

"Factum valet."

The doctrine, "*Quod fieri non debuit factum valet*," which has been treated as especially in force in the Bengal school on the ground that Jimutavahana says that "a fact cannot be altered by a hundred texts,"[5] has given rise to a distinction between matters of legal and matters only of moral obligation.[6] The doctrine is defined by Sastri G. C. Sarkar[7]

1906. The extreme anxiety of English judges to administer to the Hindus the personal law by which they thought Hindus were bound, has induced them to accept as living law all that is to be found in the ancient law books, although much may have been abandoned in practice, and is otherwise inapplicable.

[1] *Post*, p. 10.

[2] Phillips and Trevelyan's "Law relating to Hindu Wills," 1st ed., pp. 16, 17.

[3] *Krishnaramani Dasi (S. M.)* v. *Ananda Krishna Bose* (1869), 4 B. L. R. (O. C.), 231, at pp. 287, 288.

[4] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R., P. C. 1, at p. 12; 10 W. R. P. C. 17, at p. 21.

[5] *Daya Bhaga*, ch. ii., para. 30. This is the leading authority of the Bengal school; *post*, p. 14.

[6] See *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma* (1899), 26 I. A. 113, at p. 114; 22 Mad. 398, at p. 423; 21 All. 460, at p. 487; 3 C. W. N. 427, at p. 448; 1 Bom. L. R. 226; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364.

[7] "Hindu Law," 3rd ed., p. 10.

as follows: "An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidated by reason of there being texts in the Shastras prohibiting such act or transaction." In discriminating between the two forms of obligation "the actual practice of the people is commonly accepted as a guide; and that which may in words appear to be a positive and imperative injunction may, in the light of actual practice, be regarded as merely directory or monitory but legally optional; as addressed to the conscience rather than to the tribunals; and may consequently fall beyond the scope of compulsory enforcement.[1] Where the act is illegal, it is not justified by the maxim.[2]

Difference from other systems of law.

In three matters Hindu law differs from other systems of law, viz. in the family law, which arises from what is called by English lawyers the joint family system; secondly, in the law of adoption; and thirdly, in the law of succession and inheritance.

Application of Hindu law in British India.

Throughout British India, questions relating to the succession, inheritance, adoption, and marriage of Hindus, to caste, and to Hindu religious usages [3] or institutions, are decided according to Hindu law.

Although there is a variation in their language, the several enactments, which now prescribe the law to be administered in the Courts established in British India, are in substantial agreement in making this provision.

The following is a list of such enactments:—

The High Court of Bengal, in the exercise of its ordinary original civil jurisdiction.	5, 6 Geo. V. c. 5, s. 112, 21 Geo. III. c. 70, s. 17, read with the Letters Patent, 1862, s. 18, and the Letters Patent, 1865, s. 19.	High Court of Bengal.
The High Court of Madras in the exercise of its ordinary original civil jurisdiction.	5, 6 Geo. V. c. 5, s. 112, 37 Geo. III. c. 142, s. 13, read with 39, 40 Geo. III. c. 79, s. 5, Letters Patent, 1862, s. 18, and Letters Patent, 1865, s. 19.	High Court of Madras.

[1] Phillips and Trevelyan's "Law of Hindu Wills," 1st ed., p. 18.

[2] See *Balwant Singh (Rao)* v. *Kishori (Rani)* (1898), 25 I. A. 54, at p. 59; 20 All. 267, at p. 285; 2 C. W. N. 275, at p. 277.

[3] *I.e.* any usage or institution connected with religious ceremonies; see *post*, pp. 6, 7.

High Court of Bombay.

High Court of Bombay.	The High Court of Bombay in the exercise of its ordinary original civil jurisdiction.	5, 6 Geo. V. c. 5, s. 112, 37 Geo. III. c. 142, s. 13, read with 4 Geo. IV. c. 71; s. 9,[1] Letters Patent, 1862, s. 18, and Letters Patent, 1865, s. 19.

There is in the above enactments no express reference to questions of marriage, caste, or religious usages and institutions, but the Supreme Courts and High Courts have always dealt with such questions according to the personal law of the individuals concerned.[2]

Presidency Small Cause Courts.

The Presidency Small Cause Courts have to determine all questions according to the law administered by the High Courts in the exercise of their ordinary original civil jurisdiction.[3]

Bengal, Agra, Assam, Bihar, and Orissa Provincial Courts.	Bengal (outside Calcutta), the Province of Agra and Assam, and the Province of Bihar and Orissa.[4]	Act XII. of 1887, s. 37, as amended by Act XVI. of 1911.
Madras Provincial Courts.	The Courts of the Madras Presidency (outside the town of Madras), except the tracts respectively under the jurisdiction of the agents for Ganjam and Vizagapatam.	Act III. of 1873, s. 16.
Bombay Provincial Courts.	The Bombay Presidency (outside the island of Bombay).	Bombay Regulation IV. of 1827, s. 26.

The last-mentioned section is as follows: "The law to be observed in the trial of suits shall be Acts of Parliament, and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appear, the law of the defendant; and in the absence of specific law, and usage, justice, equity, and good conscience alone."

Punjab.	The Punjab.	Act IV. of 1872, s. 5, as amended by Act XII. of 1878.[5]

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[1] See *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 556.

[2] See *In re Kahandas Narrandas* (1880), 5 Bom. 154, at pp. 166, 167, 170.

[3] Act XV. of 1882, s. 16.

[4] As to Bihar and Orissa, see Act VII. of 1912.

[5] As to Delhi, see Act XIII. of 1912, s. 3.

This enactment describes the topics of Hindu law to be dealt with by the Courts as "succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship,[1] minority,[2] bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution," but in all these cases gives preference to a valid custom, which is not contrary to equity and good conscience. Although this description is more detailed than is to be found in the other enactments, the other Courts in practice apply Hindu law to all these cases when the status, act, or right of a Hindu is in question.

Oudh.—Act XVIII. of 1876, s. 3. Oudh.

This section contains provisions similar to those in force in the Punjab.

The Central Provinces.—Act XX. of 1875, s. 5. Central Provinces.

In this enactment the topics of Hindu and Mahomedan law are described in the same way as for the Punjab, except that "divorce" is not included. In the few Hindu cases in which the question of divorce arises,[3] the question would probably be held to be included in the expression "marriage."

Burma, except the Shan States.—Act XIII. of 1898, s. 13. Burma.

British Beluchistan.—Reg. III. of 1890, s. 89. British Beluchistan.

Ajmere and Merwara.—Reg. III. of 1877, s. 4. Ajmere and Merwara.

The wording of this section corresponds with that of Act IV. of 1872, s. 5.[4]

Questions of caste, *i.e.* questions relating to matters which affect the internal autonomy of a caste or its social relations,[5] and questions of religious usages and institutions can only be determined by the Civil Courts where their determination is necessary for the purpose of deciding a suit "of a civil nature." Caste and religious usages.

A suit in which the rights to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.[6]

In a Bengal case [7] the following has been said on this subject: "It may be conceded that suits in which the principal question relates to the

[1] See Act VIII. of 1890, s. 17.

[2] Except in questions of marriage, dower, divorce, and adoption, the age of majority has been fixed by Act IX. of 1875.

[3] *Post*, pp. 63, 64.

[4] Above.

[5] *Appaya* v. *Padappa* (1898), 23 Bom. 122, at p. 130; *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (1883), 7 Bom. 323, at pp. 328, 329.

[6] Act V. of 1908, s. 9; Act XIV. of 1882, s. 11. See the cases collected in the note to that section in O'Kinealy's "Civil Procedure Code," and Mulla's "Civil Procedure Code." *Venkatachalapati* v. *Subbarayadu* (1890), 13 Mad. 293; *Krishnasami* v. *Virasami Chetti* (1886), 10 Mad. 133; *Krishnasami Ayyangar* v. *Samaram Singrachariar* (1906), 30 Mad. 158; *Lokenath Misra* v. *Dasarathi Tewari* (1905), 10 C. W. N. 505. See *Sadagopa Chariar* v. *Rama Rao* (1907), 34 I. A. 93; 30 Mad. 185; 11 C. W. N. 585; 9 Bom. L. R. 663.

[7] *Gourmoni Debi* v. *Chairman of Panihati Municipality* (1910), 14 C. W. N. 1057, at pp. 1061, 1062.

performance of religious rites or ceremonies are not suits of a Civil nature, and to the same category belong suits for vindication of a mere dignity attached to an office.[1] But it is well settled that suits in which the principal question relates to the right to an office, are suits of a Civil nature, and not the less so, because the right claimed may depend upon the decision of questions as to religious rites or ceremonies or even religious tenets.[2] Now suits for offices of a religious character, that is, those in which the title to the office is dependent upon the performance of religious rites and ceremonies, may be divided into two classes, namely, *first*, religious offices to which fees are appurtenant as of right, and *secondly*, religious offices to which no fees are attached, but which entitle the holder thereof to receive such gratuities as may be paid to him. In the former class of cases, that is, in respect of offices to which fees are attached, there is no doubt that a suit will lie for a declaration that the office is vested in the plaintiff.[3] As regards religious offices of the second class, there has been some divergence of judicial opinion upon the question, whether a suit will lie for an office to which no fees are attached. In "Bengal" the view has been maintained that a suit by a person claiming to be entitled to a religious office of this description against an usurper for declaration of his right to the office is a suit of a Civil nature maintainable in a Civil Court.[4] The contrary view has apparently been maintained in Madras.[5] In Bombay, a distinction has been made between an office which is attached to a particular temple or place, and an office which is entirely personal in character. As regards the former class it has been held that the suit is maintainable.[6] As regards the latter, the balance of authority supports the view that the suit is not maintainable,[7] though the contrary view was maintained in *Sayad Hashim* v. *Husein Sha.*[8] This distinction between local and personal offices has also been recognized in Allahabad."[9]

For instance, a suit lies—

(*a*) to determine a right to give offerings at a temple;[10]

(*b*) to restrain the removal of an object of worship;[11]

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[1] See *Sunkur Bharti Swami (Sri)* v. *Sidha Lingayah Charanti* (1843), 3 M. I. A. 198; 6 W. R. P. C. 39; S. C. on remand (1845), 2 Bom. 473; *Sadagopa (Striman)* v. *Kristna Tatachariyar* (1863), 1 Mad. H. C. 301; *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (1885), 10 Bom. 233; *Karuppa Goundan* v. *Kolanthayan* (1883), 7 Mad. 91; *Gadigeya* v. *Basaya* (1910), 34 Bom. 455; 12 Bom. L. R. 358.

[2] *Krishnama Chariar (Tiru)* v. *Krishnasawmi Tata Chariar* (1910), 6 I. A. 120; 2 Mad. 62; S.C. on remand *Krishnasami* v. *Krishnama Chariar* (1882), 5 Mad. 313.

[3] *Muhammad* v. *Ahmed (Sayad)* (1861), I Bom. H. C. App. 18.

[4] *Mamat Ram* v. *Bapu Ram* (1887), 15 Calc. 159; *Kali* v. *Gouri* (1890), 17 Calc. 906; *Dinonath* v. *Protap Chundra* (1899), 27 Calc. 30; 4 C. W. N. 79.

[5] *Tholappala* v. *Venkata* (1895), 19 Mad. 62; *Subbaraya* v. *Vedantachariar* (1904), 28 Mad. 23.

[6] *Limba* v. *Rama* (1888), 13 Bom. 548; *Gursangaya* v. *Tamana* (1891), 16 Bom. 281. The right of hereditary priest to a family was upheld in *Ghelabhai* v. *Hargovan* (1911), 36 Bom. 94; 13 Bom. L. R. 1171.

[7] *Murari* v. *Suba* (1882), 6 Bom. 725; *Gadigeya* v. *Basaya* (1910), 34 Bom. 455; 12 Bom. L. R. 358.

[8] (1888), 13 Bom. 429.

[9] *Chunnu Datt Vyas* v. *Babu Nandan* (1910), 32 All. 527; *Barsati* v. *Chamru* (1907), 29 All. 683.

[10] *Vengamuthu* v. *Pandaveswara Gurukal* (1882), 6 Mad. 151.

[11] *Dhurrum Singh Mohunt* v. *Kissen Singh* (1881), 7 Calc. 707; 9 C. L. R. 410.

(*c*) to restrain the removal of religious marks in a temple, or unjustifiable changes in the character of a temple as a religious institution ;[1]
(*d*) to assert an exclusive right to worship in a temple ;[2]
(*e*) to assert a right of access to the inner shrine of a temple ;[3]
(*f*) to assert a right to officiate exclusively as a priest on the occasion of the cremation of all dead bodies brought to a particular place ;[4]
(*g*) to assert the right to administer religious rites to pilgrims.[5]
(*h*) to assert a right to fees on marriages ;[6]
(*i*) to assert a right to certain honours as high priest of a temple ;[7]
(*j*) to assert a right to a certain office in a temple ;[8]
(*k*) to assert a right to enter a prayer hall belonging to a certain religious fraternity ;[9]
(*l*) to recover vessels borrowed by another division of the caste.[10]

The Court cannot determine caste disputes, where no right of property is involved.[11] It will not interfere when an individual has been excluded from caste, or has been excommunicated or otherwise deprived of religious rights by an authority in that behalf, unless the exclusion is contrary to natural justice, as, for instance, where he has been condemned without having an opportunity of being heard.[12] The loss of a mere social right does not justify the interference of the Court.[13]

Caste questions.

The principle was laid down by *Chandavarkar, J.*, as follows in *Nathu Velji* v. *Keshawji* (1901), 26 Bom. 174 ; 3 Bom. L. R. 718, as follows :—

"A suit raising a caste question must fall in one of three classes :

"I. It may be a suit brought by a member of a caste complaining of his exclusion from it and asking for a declaration that the expulsion is illegal, and that he is still a member of the caste, and as such entitled to its social privileges. The Civil Courts have no jurisdiction to entertain such a suit.

"II. It may be a suit, brought by a member of a caste expelled from it, for a declaration that the excommunication is illegal and that he is entitled to certain rights of property or office as a member of the caste. The Civil

[1] *Krishnasami Ayyangar* v. *Samaram Singrachariar* (1906), 30 Mad. 158.

[2] *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (1883), 7 Bom. 323 ; *Krishnasami* v. *Krishnama Chariar* (1882), 5 Mad. 313.

[3] *Venkatachalapati* v. *Subbarayudu* (1889), 13 Mad. 293.

[4] *Gourmani* v. *Chairman of Panihati Municipality* (1910), 14 C. W. N. 1057. See *Hira Panday* v. *Bashu Panday* (1916), 1 Patna L. J. 381.

[5] *Ramasawmy Aiyan* v. *Venkata Achari* (1863), 9 M. I. A. 348 ; 2 W. R. P. C. 21.

[6] *Gursangaya* v. *Tamana* (1891), 16 Bom. 281.

[7] *Archakam Srinivasa Dikshatulu* v. *Udayagiri Anantha Charlu* (1869), 4 Mad. H. C. 349.

[8] *Srinivasa* v. *Tiruvengada* (1888), 11 Mad. 450.

[9] *Jagannath Churn* v. *Akali Dassia* (1893), 21 Calc. 463.

[10] *Pragji Kalan* v. *Govind Gopal* (1887), 11 Bom. 534.

[11] *Jethabai Narsey* v. *Chapsey Cooverji* (1909), 31 Bom. 467 ; 11 Bom. L. R. 1011.

[12] See *Appaya* v. *Padappa* (1898), 23 Bom. 122 ; *Keshavlal* v. *Girja (Bai)* (1899), 24 Bom. 13 ; *Jagannath Churn* v. *Akali Dassia* (1893), 21 Calc. 463 ; *Ganapati* v. *Bharati Swami* (1894), 17 Mad. 222 ; *Vallabha* v. *Madusudanan* (1889), 12 Mad. 495 ; *Krishnasami Chetti* v. *Virasami Chetti* (1886), 10 Mad. 133.

[13] *Raghunath Damodhar* v. *Janardhan Gopal* (1891), 15 Bom. 599 ; *Mayashankar* v. *Harishankar* (1886), 10 Bom. 661 ; *Kanji Bavla* v. *Arjun Shamji* (1893), 18 Bom. 115 ; *Sudharam Patar* v. *Sudharam* (1869), 3 Ben. L. R. (A. C.) 91 ; 11 W. R. C. R. 457 ; *Raj Kisto Majee* v. *Nobaee Seal* (1864), 1 W. R. C. 351.

Courts have jurisdiction to entertain such a suit, if the result of the excommunication is to deprive a man of his *civil rights*; but even here the jurisdiction is limited; all that the Court can inquire into is whether the order of excommunication was passed *bonâ fide* in accordance with natural justice. The inquiry is to be conducted from the point of view of the caste and not of the Court into the reasonableness of the rule for a breach of which the order of excommunication was passed. If these conditions are fulfilled, the Court must hold that the caste acted within its powers as a domestic tribunal with whose discretion it will not interfere.

"III. It may be a suit brought by an expelled member for damages on account of loss of caste or character. The Civil Courts have jurisdiction in such a suit; but the jurisdiction is subject to the law that a libel to a man's position in his caste can give them no right to claim damages from any of his caste-fellows if they have acted *bonâ fide* for the protection of their caste interests in the discharge of their caste duty."

In the Bombay Presidency (outside the island of Bombay), the Courts are prohibited from deciding caste questions, except in a suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.[1] The principle is, would the taking cognizance of the matter in dispute be an interference with the autonomy, *i.e.* the internal management, of the caste? [2]

Contracts and dealings.

The High Courts of Bengal, Madras, and Bombay, in the exercise of their ordinary original civil jurisdiction, are also required to administer the Hindu law in all matters of contract and dealing between Hindus, except where such matters have been the subject of legislative enactment.

So far as it goes, the Indian Contract Act [3] has superseded the Hindu law of contracts; [4] but it may sometimes be necessary to refer to Hindu law as to matters of contract or dealing. For instance, the Hindu law of gifts is to some extent still applied to gifts by Hindus,[5] and the law of *damdupat*, by which no greater arrear of interest can be recovered at any one time than what will amount to the principal sum, is applied in some cases.[6] Although the law of *damdupat* only applies to contracts, and not

[1] Bom. Reg. II. of 1827, s. 21. See *Girdhar* v. *Kalya* (1880), 5 Bom. 83; *Nemchand* v. *Savaichand* (1866), 5 Bom. 84, note; *Pragji Kalan* v. *Govind Gopal* (1887), 11 Bom. 534.

[2] *Murari* v. *Suba* (1882), 6 Bom. 725, at p. 727; *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (1883), 7 Bom. 323, at pp. 328, 329.

[3] IX. of 1872.

[4] *Madhub Chunder Poramanick* v. *Rajcoomar Doss* (1874), 14 B. L. R. 76; 22 W. R. C. R. 370.

[5] *Post*, Chap. XVIII.

[6] It applies to Calcutta and Bombay, *Nobin Chunder Banerjee* v. *Romesh Chunder Ghose* (1887), 14 Calc. 781; *Ramconnoy Audicarry* v. *Johur Lall Dutt* (1880), 5 Calc. 867; 7 C. L. R. 204; *Ganpat Pandurang* v. *Adarji Dadabhai* (1877), 3 Bom. 312; *Nusserwanjee* v. *Laxman* (1906), 30 Bom. 452; 8 Bom. L. R. 82; *Jeewanbai* v. *Manordas Lachmondas* (1910), 35 Bom. 199; 12 Bom. L. R. 992. It applies to cases outside the island of Bombay, *Sundarabai* v. *Jayavant Bhikaji Nadgowda* (1899),

to judgment debts,[1] that law may be applied in cases where the Judge has a discretion as to the rate of interest.[2]

It has been held in Calcutta[3] that the law of *damdupat* applies to mortgages, but a different view has been accepted in Madras.[4]

In some other matters, such as maintenance,[5] the Courts may administer Hindu law between Hindus as matters of equity and good conscience.

When Hindu law applicable.

In some of the enactments above referred to the Courts are required to administer the Hindu law only in cases where the defendant is a Hindu,[6] and in some of them in cases where the parties are Hindus. In either case the question as to whether the Hindu law is to be applied depends rather upon whether the person whose inheritance, succession, etc., is in dispute was a Hindu, or the persons, whose dealing is in question, were Hindus, rather than upon the accident of the arrangement of the parties in the litigation.[7]

As to the application of their personal law to Hindus, apart from legislative enactment, see *In re Kahandas Narrandas* (1880), 5 Bom. 154, at pp. 166, 167, 170.

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24 Bom. 114; 1 Bom. L. R. 551; *Sukalal* v. *Bapu Sakaram* (1899), 24 Bom. 305; 2 Bom. L. R. 18; *Dagdusa Shevakdas* v. *Ramchandra* (1895), 20 Bom. 611; *Ganesh Dharnidhar Maharajdev* (*Shri*) v. *Keshavrav Govind Kulgavkar* (1890), 15 Bom. 625; *Balkrishna Babaji* v. *Hari Govind* (1890), 15 Bom. 84; *Ali Saheb* v. *Shabji* (1895), 21 Bom. 85; *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (1884), 9 Bom. 233; *Narayan* v. *Satvaji* (1872), 9 Bom. H. C. 83. It does not apply to the Bengal Presidency outside Calcutta, *Hetnarain Singh* v. *Ram Dein Singh* (1883), 9 Calc. 871; 12 C. L. R. 590; *Surjya Narain Singh* v. *Sirdhary Lall* (1883), 9 Calc. 825; 12 C. L. R. 400; *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1898), 2 C. W. N. 603. It is not in force in Madras, *Y. Annaji Rau* v. *Ragubai* (1871), 6 Mad. H. C. 400.

[1] *Nanda Lal Ray* v. *Dhirendra Nath Chakravarti* (1913), 40 Calc. 711; *In the matter of Hari Lall Mullick* (1906), 33 Calc. 1269. See *Ram Kanye Audhicary* v. *Cally Churn Dey* (1894), 21 Calc. 841.

[2] *Hiralal Ichhalal* (*Majmudar*) v. *Narsilal Chaturbhujdas* (*Desai*) (1913), 40 I. A. 68; 37 Bom. 326; 17 C. W. N. 573; 15 Bom. L. R. 483; Act XIV. of 1882 (Civil Procedure), s. 209; Act V. of 1908 (Civil Procedure), s. 34.

[3] See *Meenakshi Ammal* v. *Rama Aiyar* (1912), 37 Mad. 396; *Kunja Lal Banaji* v. *Narsamba Debi* (1915), 42 Calc. 826; 20 C. W. N. 110.

[4] *Madhava Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1903), 26 Mad. 662.

[5] See *Meenakshi Ammal* v. *Rama Aiyar* (1912), 37 Mad. 396.

[6] See law to be administered in High Courts in the exercise of their ordinary original civil jurisdiction, *ante*, pp. 3, 4.

[7] This seems to be the effect of the following cases. *Azimunnissa Begum* v. *Dale* (1871), 6 Mad. H. C. 455, at pp. 474, 475; *Ali Saheb* v. *Shabj* (1895), 21 Bom. 85; *Lakshmandas Surupchand* v. *Dasrat* (1880), 6 Bom. 168, at pp. 183, 184; *Sarkies* v. *Prosonomoyee Dossee* (1881), 6 Calc. 794, at pp. 805, 806; 8 C. L. R. 76, at pp. 86, 87.

Sources of Hindu Law.

In the first stage of Hindu law, as writing was unknown, dependence had to be placed upon memory. The original sources were the *Sruti* (things heard) and the *Smriti* (things remembered). The former were said to be the actual utterings of the Creator. The latter, although of divine origin, were couched in the language of the *rishis* or sages of antiquity.

The *Sruti* were in words which would be recited and sung. They comprised the four Vedas, the six Vedangas, or appendages to the Vedas, and the Upanishads. There are a few passages in the Vedas which incidentally allude to a rule of a law, or which gave an instance from which a rule of law may be inferred.

The *Smritis* are the principal sources of lawyers' law, but they contain much which has nothing to do with law. The *earlier Smritis* were mere manuals for the use of students.[1]

In the second stage of Hindu law the authorities were in writing. They consisted of the Codes or *Sastras*[2] or *Smritis* which were based upon older *Smritis* and on what are called *Sutras*. Of these such as related to *Dharma*, or law or duty, only concern us. Even the *Dharma Sastras* contain much connected with religious rites, expiation, and so forth.

Of the *Sutras* (lit. Strings) those related to practical affairs are called *Dharma Sutras*, the principal of which are those by Gautama, whose date is not earlier than 300 B.C., of Baudhayana, of Apastamba, of Vasishta, and of Vishnu.

Although in theory Hindu law is ultimately based upon the *Vedas*, which are said to have been of divine origin, in matters of law the *Vedas* are of no greater authority than the *Smritis* (things heard by the *rishis*, or sages of antiquity), or codes of revealed law. For all practical purposes it is unnecessary to trace the law earlier than the *Dharma Sastras*.

In modern practice the *Dharma Sastras* are of less authority than the Commentaries and Digests, which are based upon them, and the views expressed in the Commentaries and Digests in their place give way to the decisions of the Judicial Committee of the Privy Council and of the High Courts of British India.

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[1] Banerjee's "Law of Marriage," 3rd ed., p. 4.

[2] Scriptures.

With regard to the interpretation of ancient text-books on Hindu law the Judicial Committee say this,[1] "They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers, accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law givers." Interpretation of authorities.

The principal Codes or *Sanhitas* constituting the *Dharma Sastras* [2] are— The *Sastras*.

1. The Code of Institutes of *Manu*.[3]

This is undoubtedly the most important of the *Dharma Sastras*. Its authorship is unknown, and there is great uncertainty as to its age. It was translated by Sir William Jones, who considered it was written in the thirteenth century B.C. Modern investigation has placed it much later.

Professor Macdonell [4] considers that it "probably assumed its present shape not much later than 200 A.D." Dr. Bühler [5] considers "that the work, such as we know it, existed in the second century A.D." Professor Jolly [6] remarks that the code cannot well be placed later than the second to third century A.D. Professor Max Müller held [7] that it cannot be earlier than 400 A.D., but this view has been met by Dr. Bühler.[8]

2. The Code or Institutes of *Yajnavalkya*.

This code is second in importance to that of *Manu*. It was apparently written in one of the early centuries of the Christian era. The *Mitakshara* [9] is a commentary upon this code.

3. The Code or Institutes of *Narada*.

The translator (Dr. Jolly) of this code fixes its earliest possible date at about 400 or 500 A.D.

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[1] *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*); *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 136; 22 Mad. 398, at pp. 415, 416; 21 All. 460, at pp. 478, 479; 3 C. W. N. 427, at p. 442; 1 Bom. L. R. 226; *Balwant Singh* (*Rao*) v. *Kishori* (*Rani*) (1898), 25 I. A. 54; 20 All. 267; 2 C. W. N. 273.

[2] Works of authority. For a list of all the Sanhitas (collections or institutes), see Sircar's "Vyavastha Darpana," preface, and Bhattacharya's "Hindu Law," 2nd ed., p. 25.

[3] For an account of Manu's Code see the introduction to "Sacred Books of the East," vol. xxv., by Dr. G. Bühler.

[4] "History of Sanskrit Literature," p. 428.

[5] "Sacred Books of the East," vol. xxv. p. cxiv.; "Imperial Gazetteer of India" (1908), ii. 262.

[6] "Recht und Sitte" (Encyclopædia of Indo-Aryan Research), p. 16.

[7] "India, What can it Teach us?" pp. 91, 366.

[8] "Sacred Books of the East," vol. xxv. p. 117. In 15 C. W. N. cxi., Mr. Kashi Prasad Jayaswal fixes the date at about 150 B.C.

[9] *Post*, p. 16.

Commentaries and Digests.

After the *Sastras* the next step in the development of Hindu law consisted in the composition of a number of Commentaries and Digests based upon the *Sastras*.

The authority of the several commentators necessarily varied in different districts, and thus arose the schools of law, which are operative in different parts of India.[1]

The differences between these schools are said to have risen in the main from the different views expressed by the commentators who were of authority in the districts which were governed by the schools respectively. Difference of the custom of districts may also have helped to differentiate the schools both directly and indirectly by influencing the opinions of the commentators.

Principal schools of Hindu law.

The two principal schools [2] of Hindu law are—

1. The Mitakshara [3] school, which prevails throughout India, except where the Bengal school prevails.

This is the older and more orthodox system of Hindu law. It is a relic of the patriarchal system.

2. The Bengal or Daya-bhaga [4] school, which prevails where the Bengal language is spoken by the inhabitants of the country.[5]

This school was founded by Jimutavahana [6] and Raghunandana [7] in the fifteenth century. It has been considered by some writers to owe its origin to Brahminical authority, but Mr. S. C. Mitra attributes the peculiarities of this school to the commercial activity of the Bengalees, and to their antagonism to Brahmanism.[8] The former view is supported

[1] See *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A., 397, at p. 435; 1 B. L. R. P. C. 1, at p. 11; 10 W. R. P. C. 17, at p. 21; G. D. Banerjee's "Law of Marriage," 3rd ed., p. 5. Dr. Jogendranath Bhattacharya ("Hindu Law," 2nd ed., pp. 28, 29) considers that the Commentaries and Digests were the outcome of a desire to reconcile the Smritis at the time when Brahminism had regained its ascendancy. See also S. C. Mitra in "Law Quarterly Review," vol. xxi. p. 380, xxii. p. 50.

[2] This expression has been objected to, but it was defended by Colebrooke (Strange's "Hindu Law," vol. i. p. 319) who originated it. See G. D. Banerjee's "Law of Marriage," 3rd ed., pp. 6, 7; Rajkumar Sarvadhikari's "Law of Inheritance," pp. 343–346.

[3] So named after the treatise by *Vijnaneshvara* (*post*, p. 10), which is of authority throughout India, except where superseded by other works in Bengal and Western India.

[4] Sometimes called the *Gauriya* school.

[5] That is, the Revenue divisions of the Presidency of Bengal, Rajshaye, Dacca, Burdwan, and Chittagong, Manbhoom, the Assam Valley districts, Sylhet and Cachar. As to Assam, see *Deepo Debia* v. *Gobindo Deb* (1871), 16 W. R. C. R. 42.

[6] *Post*, p. 14.

[7] *Post*, p. 15.

[8] "Law Quarterly Review," vol. xxi. p. 380; vol. xxii. p. 50.

by the religious character of the system of inheritance (*post*, chap. xii.). The latter view is supported by the freedom of alienation allowed by the Bengal school.

The Mitakshara school is subdivided into four minor schools, viz.— Subdivision of Mitakshara school.

1. The Benares school.

This school prevails in Behar, in the district of Benares, and in Central and North-western India, and in the whole of Northern India,[1] except that in the Punjab it is considerably modified by customary law.

2. The Dravida or Dravira school.

This school prevails in the Madras Presidency, *i.e.* in the southern portion of the peninsula. It was founded in the thirteenth century by Devananda Bhatta.[2]

Mr. Morley[3] says that the Dravida school "may be subdivided into three districts in each of which some particular law treatises have more weight than others; these districts are: Dravida, properly so called,[4] Karnátaka,[5] and Andhra."[6] Subdivision of Dravida school.

3. The Maharashtra school.

This school prevails where the Maratha language is spoken as a vernacular and in Guzerat and Kanara.

[1] Orissa is said, in Morley's "Digest" (Introduction, p. cxc.), to be governed by this school. In a note to *Bishenpirea Munee* v. *Soogunda* (*Ranee*) (1801), 1 Ben. Sel. R. 37, at p. 39, note (2nd ed., 49, at p. 51, note), Mr. Macnaghten states that "the authorities followed in Orissa are the same with those of Bengal"; but the opinions of the pundits in this case were not founded on Bengal authorities, and as Mr. Mayne points out (8th ed., p. 11, note), in another Orissa case mentioned in Macnaghten's "Hindu Law," ii. 306, the opinion of the pundits was founded on the Mitakshara. In *Raghunadha* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291, which was a case from Ganjam, which was included in the ancient Hindu kingdom of Orissa, the law of the Dravida school was applied apparently without question. Mr. Mayne ("Hindu Law," 8th ed., p. 11) suggests that the Court applied the system of law with which it was most familiar. In *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534, the Mitakshara law was applied to a case from Orissa. See also *Kalee Pudo Banerjee* v. *Choitun Pandah* (1874), 22 W. R. C. R. 214; *Jogendra Bhupati Hurri Chundun Mahapatra* (*Raja*) v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151. In *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 432; 6 C. W. N. 490; 4 Bom. L. R. 365, the decision of the Court in India showed that Orissa was governed by the Mitakshara, but the question was not decided by the Judicial Committee.

[2] *Post*, p. 17. See *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 433; 1 B. L. R. P. C. 1, at p. 10; 10 W. R. P. C. 17, at p. 20.

[3] Morley's "Digest," Introduction, p. cxci.

[4] Where the Tamil language is spoken.

[5] Where the Kanarese language is spoken.

[6] Where the Telegu language is spoken. See *Narasammal* v. *Balaramacharlu* (1863), 1 M. H. C. 420, at p. 425.

4. The Mithila school.

This school prevails in what was in ancient times the Province of Mithila, or Tirhoot,[1] and in the adjoining districts. It was founded by Chandeshwar, 1314 A.D., and Vachaspati Misra, who flourished in the fifteenth century.[2]

Punjab school.

Sastri Golap Chundar Sarkar [3] added to this enumeration a school which he called the Punjab school. This school is not recognized by other text writers, and is not referred to in the authorities by that name. There may be many differences between the Hindu law as administered in the Punjab and that which is administered in the other provinces, but such differences arise from the existence of local customs, upon which the law is there based,[4] and do not, as in the case of the other schools,[5] arise from differences of opinion as to the true construction of texts.

The geographical limits of these schools cannot be accurately defined.[6] Where there is a dispute as to which school prevails in a particular locality the question must be determined upon evidence.

The redistribution of districts or other arbitrary divisions of land by the Government does not render the inhabitants of the locality dealt with liable to be subject to a different school of law.[7]

Paramount works of authority, Bengal school.

The following are the principal works of authority in the Bengal school: [8]—

1. *Daya-bhaga*,[9] by Jimutavahana.

Nothing certain seems to be known of the author. According to Mr. Colebrooke and to Dr. Jogendranath Bhattacharya he probably lived in

[1] "The district of Tirhoot, which is a corruption of the Sanskrit name *Tirabhukti*, is, as the name implies, bounded on three sides by three rivers, namely, by the Gandak on the west, the Kosi on the east, and the Ganges on the south." G. C. Sarkar's "Law of Adoption," p. 446. See map of ancient Mithila annexed to P. C. Tagore's translation of the Vivada Chintamani.

[2] Bhattacharya's "Hindu Law," 2nd ed., p. 49.

[3] "Hindu Law," 3rd ed., p. 29. "Law of Adoption," pp. 228, 254.

[4] See Tupper's "Punjab Customary Law," vol. ii. pp. 82-86.

[5] *Ante*, p. 12.

[6] See Morley's "Digest," Introduction, pp. clxxxix.-cxcii.

[7] *Prithee Singh* v. *Court of Wards* (1875), 23 W. R. C. R. 272. This decision was after remand by the Judicial Committee in *Sheo Soondoree* (*Mussamut*) v. *Pirthee Singh* (1872), 21 W. R. C. R. 89. The judgment of the Judicial Committee seems to show that the burden was upon the person asserting the retention of the law originally applicable to the district, but this view of the judgment was not suggested in the judgment of the High Court on remand, nor was it referred to when the case came again before the Judicial Committee (*Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147).

[8] See Mitra's "Law of Joint Property," p. 13; Bhattacharya's "Hindu Law," 2nd ed., p. 49.

[9] Lit.: Partition of Inheritance.

Bengal in the fifteenth century.[1] Sastri Golap Chandra Sarkar,[2] considers that Jimutavahana flourished in the last quarter of the eleventh, and the first quarter of the twelfth century A.D. He identifies him as the minister of Viswaksena, a king of Bengal. The work was translated by Mr. H. T Colebrooke. It is the highest authority in Bengal.[3]

2. *Smriti* of Raghunandana.

This author is said to be of the highest authority in Bengal except in matters of inheritance.[4] The portion of the work relating to inheritance (Dayatattwa) in general strictly follows the Daya-bhaga. Raghunandana seems to have flourished in the latter half of the fifteenth century or beginning of the sixteenth century.[5]

3. *Daya-krama Sangraha*, by Sri Krishna Tarkalankar.

This is a treatise on the law of inheritance, following the Daya-bhaga, and apparently written early in the eighteenth century. It was translated by Mr. P. M. Wynch in 1818.

4. *Srikrishna's Commentary.* A commentary on the Daya-bhaga, by the last-named writer.

5. *Dattaka Chandrika.* A treatise on the law of adoption.

The translator (Mr. Sutherland) ascribed the authorship of this work to Devananda Bhatta, the author of the "Smriti Chandrika," [6] but it is now taken to be the work of a Bengal Pundit.[7] It has been suggested that this work was forged for the purpose of a particular suit,[8] but the Judicial Committee has treated the "Dattaka Chandrika" as of great authority in questions of adoption in Bengal.[9]

[1] See Bhattacharya's "Hindu Law," 2nd ed., pp. 33 35, and preface to Colebrooke's translation of "Daya-bhaga."

[2] "Hindu Law," 3rd ed., pp. 27, 28.

[3] Bhattacharya's "Hindu Law." 2nd ed., p. 37.

[4] Bhattacharya's "Hindu Law," 2nd ed., p. 36. The portion of his work dealing with inheritance (Dayatattwa) has been translated by G. C. Sarkar.

[5] See Sircar's "Vyavastha Darpana," 2nd ed., xvi. note.

[6] *Post*, p. 17.

[7] Mayne's "Hindu Law," 8th ed., pp. 31, 32; V. N. Mandlik, Introd., 73; Bhattacharya's "Hindu Law," 2nd ed., p. 32; Jolly's "Lectures," pp. 22, 23; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 323, 324.

[8] Sarkar's "Law of Adoption," pp. 124–126. This view is also taken by Dr. Jolly in "Die Adoption in Indien," Wurzburg, 1910.

[9] *Rungama* v. *Atchama* (1847), 4 M. I. A. 1, at p. 57; 7 W. R. P. C. 57, at p. 59; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22; *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)*, *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at pp. 131, 132; 22 Mad. 398, at p. 411; 21 All. 460, at pp. 465, 466; 3 C. W. N. 427, at p. 439; 1 Bom. L. R. 226; *Bhagwan Singh* v. *Bhagwan Singh* (1898), 26 I. A. 153, at p. 161; 21 All. 412, at p. 419; 3 C. W. N. 454, at p. 457; 1 Bom. L. R. 311; S.C. in Court below (1895), 17 All. 294; *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (1915), 43 I. A. 56; 40 Bom. 270; 20 C. W. N. 272; 18 Bom. L. R. 172.

The *Mitakshara* is also of high authority in Bengal in matters where it does not conflict with the above-named works.[1]

Mitakshara school.

In the Mitakshara school the guiding authority[2] is the work from which the name of the school has been taken, viz. the *Mitakshara,* which is a commentary on *Yajnavalkya,*[3] by Vijnaneshwara Jogi.

The author is said to have lived at the end of the eleventh century. "Vijnaneshwara's views and opinions are eminently practical. The high authority which his work enjoys almost throughout India is due partly to that reason and partly also to the fact that he was the councillor of the most powerful Hindu king of his time."[4] He lived at Kalyana (probably the modern Kalyāni in the Nizam's dominions), which was the capital of Vikramaditya VI., or Vikramanka, King of the Chalukya kingdom of the Deccan from 1076 for about half a century.[5]

The schools, which are subdivisions of the Mitakshara school, give preference to certain treatises and commentaries which control and explain passages of the Mitakshara. Thus arise the differences between those subdivisions.[6]

Where there is no consensus of opinion among the commentators or established usage, the doctrines of the Mitakshara prevail.[7]

The following are the principal works of authority in those schools:[8]

In the Benares school.

1. *Vira Mitrodaya.*[9]

This work was written by Mitra Misra, who probably lived in the

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[1] Bhattacharya's "Hindu Law," 2nd ed., p. 34. *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487, at p. 507; 9 W. R. P. C. 23, at p. 29; *Akshay Chandra Bhuttacharya* v. *Hari Das Goswami* (1908), 35 Calc. 721, at p. 727; 12 C. W. N. 511, at p. 515.

[2] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at p. 368. *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 435; 1 B. L. R. P. C. 1, at p. 11; 10 W. R. P. C. 17, at p. 21. *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bom. H. C. 65.

[3] *Ante*, p. 11.

[4] Bhattacharya's "Hindu Law," 2nd ed., p. 31.

[5] V. A. Smith's "Early History of India," 3rd ed., p. 432.

[6] *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487, at pp. 507, 508; 9 W. R. P. C. 23, at p. 29.

[7] See *Raju Gramany* v. *Ammani Ammal* (1906), 29 Mad. 358.

[8] Sarkar's "Hindu Law," 3rd ed., pp. 28, 29. Mitra's "Law of Joint Property," p. 1.

[9] See Introduction to G. C. Sarkar's translation, pp. xiii., xiv. Bhattacharya's "Hindu Law," 2nd ed., p. 36.

sixteenth century, for the purpose of refuting the arguments of Jimuta Vahana [1] and the other writers of the Bengal school.[2]

The *Vira Mitrodaya* is of very high authority in the Benares school,[3] but cannot be followed where it conflicts with a clear statement in the *Mitakshara*.[4]

2. *Nirnaya Sindhu.*

This work was written by Kamalakara, and was completed in 1612 A.D.

3. *Dattaka Mimansa.*

This is a treatise on adoption by Nanda Pandita, who lived at Benares in the seventeenth century. It has been translated by Mr. Sutherland. The authority of this work has been emphasized by the Judicial Committee on more than one occasion,[5] but caution is to be applied in accepting the glosses of *Nanda Pandita*, where they deviate from or add to the *Smritis*.[6]

In the Dravida school.[7]

Dravida school.

1. *Smriti Chandrika*, by Devananda Bhatta.

The author lived in Southern India about the thirteenth century.[8] The authority of this work is, in the absence of usage to the contrary, subordinate to that of the *Mitakshara*.[9] Its authority is said to be second only to that of the *Mitakshara*.[10] It has been translated by T. Kristnasawmy Iyer.

2. *Parasara Madhavya.*

This is a commentary on the *Parasara Smriti* by Manhava, who was Prime Minister of Bukka, the third King of Vijayanagara, whose reign

[1] *Ante*, pp. 14, 15.

[2] S. C. Sircar's "Vyavastha Chandrika," vol. i., Introduction, p. 17, and note.

[3] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22; *Gridhari Lall Ray* v. *The Bengal Government* (1868), 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at pp. 340–342; *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215, at p. 231.

[4] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at pp. 367, 368.

[5] Cases, *ante*, p. 15, note 9. See *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at pp. 341, 342; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 322, 323.

[6] *Puttu Lal* v. *Parbati Kunwar* (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841; 17 Bom. L. R. 549, referring to *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*); *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113; 22 Mad. 398; 21 All. 460; 3 C. W. N. 427; 1 Bom. L. R. 226; *Bhagwan Singh* v. *Bhagwan Singh* (1898), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454; 1 Bom. L. R. 311.

[7] See *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22.

[8] Jolly's "Lectures," 20, 21.

[9] *Raju Gramany* v. *Ammani Ammal* (1906), 29 Mad. 358; *Muthappudayan* v. *Ammani Ammal* (1897), 21 Mad. 58; *Salemma* v. *Lutchmana Reddi* (1897), *Ibid.*, 100.

[10] Strange's "Manual," 2nd ed., pp. 3, 4. Bhattacharya's "Hindu Law," 2nd ed., p. 32.

commenced about 1361. It is said to be "in high esteem in Benares and in the Southern and Western schools."[1]

3. *Sarasvati Vilasa.*[2]

This work was written by Pratapa Rudra Deva, a King of Orissa, early in the sixteenth century. It has been translated by Mr. Foulkes.

4. *Vyavahara Nirnaya.*

This was written by Varadaraja about the end of the sixteenth century. It has been translated by Dr. Burnell.

5. *Dattaka Chandrika.*[3]

The application of this work to Southern India is said to have been due to a mistake made by the translator in attributing the authorship to the author of the *Smriti Chandrika*;[4] but as it has been treated by the Judicial Committee as an authority in Southern India,[5] the effect of this mistake, if it be one, cannot be altered.

The Judicial Committee has also affirmed the *Vira Mitrodaya*[6] to be a work of authority in Southern India,[7] but it is submitted that that work is only of secondary authority elsewhere than in Benares.[8]

Maharashtra school.

In the Maharashtra school.

1. *Vyavahara Mayukha.*

This was composed by Nilkantha Bhatta about the beginning of the seventeenth century. It is of paramount authority in Gujarat,[9] in the Northern Konkan,[10] and in the island of Bombay,[11] and apparently in

[1] Bhattacharya's "Hindu Law," 2nd ed., p. 31. The portion relating to inheritance (*Daya-vibhaga*) has been translated by Dr. Burnell.

[2] Lit.: the recreations of *Sarasvati*, the goddess of learning. As to the authority of this work, see "Nelson's View of Hindu Law," pp. 112, 113.

[3] *Ante*, p. 15.

[4] See Jolly's "Lectures," p. 23.

[5] See cases *ante*, p. 15, note 9.

[6] *Ante*, pp. 16, 17.

[7] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 153; 5 Calc. 776, at pp. 788, 789; 6 C. L. R. 322, at p. 332, referring to *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34, which merely states that the work in question is of high authority in Benares.

[8] See *post*, p. 19.

[9] See West and Bühler's "Hindu Law," 2nd ed., p. 3. This applies to the Kamathis, settled in Bombay; *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545. The *Hazur* Court of Baroda has held that the Mitakshara is paramount in Guzerat; see Acharya's "Codification in British India," pp. 345 *et seq.*

[10] *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353, at pp. 365 *et seq.* As to the limits of the Northern and Southern Konkan, see *Narhar* v. *Bhau* (1916), 40 Bom. 621; 18 Bom. L. R. 744.

[11] *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 574; *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 418; *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bom. H. C. 65. See *Vijiarangam* v. *Lakshuman*

Sindh.[1] In the Mahratta country, and in the Southern Konkan and Northern Canara, its authority is inferior only to that of the *Mitakshara*.[2] Throughout Western India it is of high authority,[3] and its aid will be invoked where the *Mitakshara* is silent or obscure.[4] It has been translated by Mr. Borradaile, and again by Mr. V. N. Mandlik.

"Questions on the Hindu law of inheritance to property in the island of Bombay are to be determined in accordance with the *Mitakshara*, subject to the doctrine to be found in the *Mayukha*, where the latter differs from it. But as laid down by Telang, J., in *Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle*;[5] 'Our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another wherever and so far as that is reasonably possible'" [6]

2. *Nirnaya Sindhu*.[7]
3. *Dattaka Mimansa*.[8]
4. *Samskara Kaustaba*.[9]

This work is by Anantadeva. It is said to belong to the same period as the *Nirnaya Sindhu*.

In the introduction to West and Bühler's "Hindu Law" [10] it is stated that the *Viramitrodaya* [11] and the *Dattaka Chandrika* [12] are also authorities in Western India. The latter is an authority in Western India on the subject of adoption,[13] but the former is, it is submitted, rather a Benares than a Bombay authority.[14]

(1871), 8 Bom. H. C. O. C. 244. This applies to Kamathis settled in Bombay, *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545.

[1] See 15 Bom. L. R. Journal, p. 49.

[2] *Balkrishna Bapuji Apte* v. *Lakshman Dinkar* (1890), 14 Bom. 605; *Jankibai* v. *Sundra* (1890), 14 Bom. 612; *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bom. H. C. 65.

[3] *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 574.

[4] *Bhagwan Vithoba* v. *Warubai* (1908), 32 Bom. 300, at p. 312; 10 Bom. L. R. 389.

[5] (1892), 17 Bom. 114, at p. 118.

[6] *Kessarbai* (*Bai*) v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 187; 30 Bom. 431, at p. 442; 10 C. W. N. 802, at p. 807; *Bhagwan Vithoba* v. *Warubai* (1908), 32 Bom. 300, at p. 312; 10 Bom. L. R. 389.

[7] *Ante*, p. 17.

[8] *Ante*, p. 17. See *Waman Raghupati Bova* v. *Krishnaji Kashirav Bova* (1889), 14 Bom. 249, at p. 259; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 166; *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App., i., at pp. x., xii., *Pranjeevandas Toolseydas* v. *Dewcooverbaee* (1859), 1 Bom. H. C. 130, at p. 131.

[9] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22.

[10] 2nd ed., p. 1.

[11] *Ante*, pp. 16, 17.

[12] *Ante*, p. 15.

[13] *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (1889), 14 Bom. 249, at p. 259.

[14] *Dhondu Gurav* v. *Gangabai* (1879), 3 Bom. 369; *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 438; 1 B. L. R. P. C. 1, at p. 14; 10 W. R. P. C. 17, at p. 22; *Gridhari Lall Roy* v. *The Bengal Government* (1868), 12 M. I. A. 448, at p. 466; 1 B. L. R. P. C. 44, at p. 52; 10 W. R. P. C. 32, at p. 34; K. K. Bhattacharya's "Law of the Joint Family," p. 199; see *ante*, pp. 16, 17.

Mithila school.

In the Mithila school.

1. *Vivada Chintamani.*

This work was written by Vachaspati Misra, who flourished in Tirhoot in the beginning of the fifteenth century. It is the work of highest authority in this school. It has been translated by Prosono Coomar Tagore.

The *Vyavahara Chintamani* and the *Dwaita Nirnaya*, both by the author of the *Vivada Chintamani*, are also authorities in the Mithila country.

2. *Vivada Ratnakara.*

This is an older compilation, but of less authority than the *Vivada Chintamani*. The writer was Chandesvara Thakkura, Prime Minister of Hara Sinha Deva, King of Mithila. He flourished at the end of the thirteenth or beginning of the fourteenth century. This work has recently been translated by G. C. Sarkar and Digamvar Chatterjee.

3. *Dattaka Mimansa.*[1]

Sudhivivreka, by Rudradhara, *Dwaita Parishista*, by Keshav Misra,[2] and *Vivada Chandra*, by Lachmadevi,[3] are also authorities in this school.

Differences between the schools.

The Bengal and the Mitakshara systems differ in two main particulars,[4] viz.—

1. As to the persons who are coparceners, and their rights, as such, in property held in coparcenary, *i.e.* as a joint Hindu family.

Under the Mitakshara system rights in family property are acquired by birth and lapse by death.[5] Individual rights are not generally recognized. The family is the unit and females have generally no right of succession, the male members having rights of survivorship. In Bengal, rights in joint property are required by inheritance or will. In consequence of this difference, the law as to the power to alienate an undivided share differs under the two systems.

2. As to inheritance.

The Mitakshara system prefers agnates to cognates generally. The Bengal school founds rights of inheritance upon the principle of the amount of religious efficacy which the person claiming can give by an offering to the *manes* of the person, whose property is in dispute, or of his ancestor.

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[1] *Ante*, p. 17. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 437; 1 B. L. R. P. C. 1, at p. 13; 10 W. R. P. C. 17, at p. 22.

[2] Bhattacharya's "Hindu Law," 2nd ed., p. 49.

[3] Colebrooke's "Digest," Introduction, p. xix.; see *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133, at p. 147.

[4] See Mayne's "Hindu Law," 8th ed., p. 40.

[5] *Post*, pp. 225, 236, 237.

The subdivisions of the Mitakshara school differ between themselves, and from the Bengal school, as to the right of a widow to adopt a son to her deceased husband,[1] and in certain other matters connected with adoption. They also differ in some questions of inheritance.

The Maharashtra school differs from all other schools in conferring rights of inheritance upon certain female relations, and in giving greater powers to female owners.

Decisions of Courts of Law. The decisions of English Courts of law have played a considerable part in ascertaining, developing, and sometimes in crystallizing Hindu law. The Courts in India necessarily follow without question the decisions of the Judicial Committee of the Privy Council, and of the High Courts [2] to which they are subordinate. Now that the volume of reported decisions upon questions of Hindu law has become so large, judicial decisions, in most cases, provide an answer to the questions which arise.

The High Court of Patna follows the decisions of the Bengal High Court except when they have been differed from by a Full Bench of the former Court.[3]

Legislative enactments. By the following enactments the Legislature has made some alterations in those portions of the Hindu law which the Courts are required to administer :—

1. Act XXI. of 1850 (Freedom of Religion).
2. Act XV. of 1856 (Hindu widows remarriage).
3. Act XXI. of 1866 (Native converts Marriage Dissolution).
4. Act VII. (Bom. C.) of 1866 (Hindu's liability for ancestor's debts).
5. Act XXI. of 1870 (Hindu wills).
6. Act IX. of 1872 (Contracts).[4]
7. Act IX. of 1875 (Majority).
8. Act IV. of 1882 (Transfer of Property).
9. Act III. (B. C.) of 1904 (Settled Estates Act).
10. Act II. (U. P. C.) of 1900 (Oudh Settled Estates Act).
11. Act I. (Mad. C.) of 1914 (Hindu Transfers and Bequests Act).
12. Act XV. of 1916 (Hindu Disposition of Property).

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[1] *Post*, pp. 118, 119.

[2] See *Puttu Lal* v. *Parbati Kunwar* (*Musammat*) (1915), 42 I. A. 155, at p. 160; 37 All. 359, at p. 366; 19 C. W. N. 841, at p. 847; 17 Bom. L. R. 549, at p. 554.

[3] *Harihar Misser* v. *Mahomed* (*Syed*) (1916), 20 C. W. N. 983.

[4] See *ante*, pp. 8, 9.

To whom Hindu Law is Applicable.

To what persons Hindu law is applicable.

The expression "Hindus," in the enactments above referred to, includes not only persons who profess what is called the Hindu religion,[1] but also such of their descendants as have not openly abjured that religion.[2]

"In doubtful cases conformity to the manners and observances of the Hindus is a safe guide for concluding that a particular family is to be governed by the Hindu law." [3]

"Hinduism is only recognized by the community to whom it is applied as denoting a distinction between them and the foreigner. The word was first used by the Muslim invaders for all Indian creeds in which the uncompromising Unitarianism of the followers of the Prophet detected signs of the worship of idols." In its conventional sense it means "the collection of rites, worships, beliefs, traditions and mythologies that are sanctioned by the sacred books and ordinances of the Brahmins, and are propagated by Brahmanic teaching." [4]

In dealing with the expression "Hindu" in the Indian Succession Act (X. of 1865), s. 331, Dr. Whitley Stokes, in his edition of that Act, at p. 200, says, "But the term 'Hindu' would not, apparently, include the *Bábá Lális* who adore but one God, dispensing with all forms of worship, and directing their devotions by rules and objects derived from a medley of *Védanta* and *Súfi* tenets (H. H. Wilson's Works, i. 347); the *Prán Náthis* or *Dhámis* in Búndelkhand who consent to the real identity of the essence of the Hindu and Mahomedan creeds (*Ibid.*, 532); the *Sádhus* (Puritans), a sect of Hindu Unitarians who are found chiefly in the upper part of the Doáb from Farúkhábád to beyond Delhi (*Ibid.*, 352); the *Çira Narayanis*, who simply profess the worship of one God, and admit proselytes alike from Hindus and Mahomedans (*Ibid.*, 358); the Çunyavádós whose doctrines are atheistical (*Ibid.*, 359)."

Castes.

Hindus are divided into the following four main divisions, or, as they are usually called, "castes" [5] :—

1. The *Brahmins*, or priestly caste.
2. The *Kshatriyas*, or warrior caste.[6]

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[1] See *Dagree* v. *Pacotti San Jao* (1895), 19 Bom. 783, at p. 788.

[2] Banerjee's "Law of Marriage," 3rd ed., p. 16.

[3] Bhattacharya's "Law of the Joint Family," p. 50.

[4] Bain's "Ethnography," citing Lyall's "Asiatic Studies."

[5] This word is derived from the Latin "casta," pure, unmixed.

[6] See *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18, at p. 46; 4 W. R. P. C. 132, at pp. 135, 136. As to the almost complete disappearance of Kshatriyas and Vaisyas, see Sarkar's "Hindu Law," 3rd ed., p. 39. The claims of the *Kayasthas* to be *Kshatriyas* is advocated by G. C. Sarkar, "Law of Adoption," 2nd ed., pp. 419c, 419d; but such claim has been negatived in a Bengal case (*Asita Mohun Ghosh Moulik* v. *Nirode Mohun Ghosh Moulik* (1916), 20 C. W. N. 901), and in a Behar case (*Raj Coomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688).

3. The *Vaisyas*, or agricultural caste.
4. The *Sudras*.

When caste first originated in the Epic Age, the pure Hindus were members of the first three of these divisions, and the members of those divisions are now styled regenerate, or twice-born, having regard to the ceremonies of initiation which are peculiar to them. Each of these castes is now divided into a number of sub-castes. In the case of the Sudras nearly every occupation has its caste.

In the Bengal Census report for 1901, Mr. Gait says (at p. 354), "A caste is an endogamous group in a collection of endogamous groups, bearing a common name, the members of which by reason of similarity of traditional occupation and reputed origin are generally regarded . . . as forming a single homogeneous community, the constituent parts of which are more nearly related to each other than they are to any other section of the society."

Jains and Sikhs.

In the absence of a special custom; Hindu law is applied to Jains,[1] to Sikhs,[2] and to Nambudri Brahmins.[3]

Loss of caste.

Degradation from caste,[4] or a departure from orthodoxy in the matter of diet or ceremonial observance,[5] does not prevent the application of Hindu law.

Change of religion.

Except so far as the Hindu law may be inconsistent with the new religion (if any) adopted by persons who have renounced the Hindu religion,[6] such law continues generally applicable to such persons and to their descendants, if they do not elect to abandon their subjection to Hindu law.[7]

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[1] *Sheo Singh Rai* v. *Dakho* (*Mussumut*) (1878), 5 I. A. 87; 1 All. 688; S. C. in court below (1874), 6 N. W. P. 382; *Chotay Lall* v. *Chunno Lall* (1878), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; *Ambabai* v. *Govind* (1898), 23 Bom. 257; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347; *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116; *Bhagvandas Tejmal* v. *Rajmal* (1875), 10 Bom. H. C. 241, at p. 258; *Bachebi* v. *Makhan Lal* (1880), 3 All. 55.

[2] *Bhagwan Koer* (*Rani*) v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at p. 254; 31 Calc. 11, at pp. 30, 31; 7 C. W. N. 895, at p. 901; 5 Bom. L. R. 845; *Kissen Chunder Shaw* (*Doe dem*) v. *Baidam Beebee* (1815), 2 Morley's "Digest," 220. See 1 Morley's "Digest," p. clxxvii.; *Juggo Mohun Mullick* (*Doe dem*) v. *Saumcoomar Bebee* (1815), 2 Morley's "Digest," 43; Sir Edward Hyde East's evidence before a committee of the House of Lords, referred to in *Lopes* v. *Lopes* (1868), 5 Bom. H. C. O. C. 172, at p. 185.

[3] *Vishnu Nambudri* v. *Akkamma* (1910), 34 Mad. 496.

[4] Act XXI. of 1850.

[5] *Bhagwan Kuar* (*Rani*) v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at p. 257; 31 Calc. 11, at p. 33; 7 C. W. N. 895, at p. 903; 5 Bom. L. R. 845.

[6] As, for instance, persons converted to Christianity cannot retain the practice of polygamy, *post*, p. 36. *In re Millard* (1887), 10 Mad. 218; *Lopez* v. *Lopez* (1885), 12 Calc. 706, at p. 722; *Emperor* v. *Lazar* (1907), 30 Mad. 550.

[7] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at pp. 240–242; 1 W. R. P. C. 1, at pp. 5, 6 (a case of conversion to Christianity); *Ponnusami*

As to the effect of the conversion of a coparcener, see *post*, p. 350.

Conversion to Mahomedan religion.

But except on proof of a well-established custom,[1] and then only with regard to succession and inheritance,[2] converts to the Mahomedan religion, which in itself regulates the devolution of property, are bound by the Mahomedan law.[3]

Such custom has been fully established in the case of the Khoja Mahomedans,[4] the Cutchi Memons,[5] the Suni Borah Mahomedan community of the Dhandhuka Taluka in Gujerat,[6] and the Molesalem

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Nadan v. *Dorasami Ayyan* (1880), 2 Mad. 209 (ditto); *Bhagwan Koer (Rani)* v. *Jogendra Chandra Bose* (1903), 30 I. A. 249, at pp. 256, 257; 31 Calc. 11, at p. 33; 7 C. W. N. 895, at p. 903; 5 Bom. L. R. 854 (a case of an alleged Brahmo); *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784 (a case of a Brahmo). In *Francis Ghosal* v. *Gabri Ghosal* (1906), 31 Bom. 25, differing from *Tellis* v. *Saldanha* (1886), 10 Mad. 69, it was held that coparcenership can be a part of the law governing the rights of a Christian family, converted from Hinduism. In *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 347, it is said, "A Hindu or Mohammedan who becomes a convert to some other faith, is not deprived *ipso facto* of his rights to property by inheritance or otherwise. *Primâ facie* he loses the benefits of the law of the religion he has abandoned, and acquires a new legal status according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations."

[1] *Post*, pp. 27–32.

[2] *Khoja* and *Memon's* case (1847), Perry's O. C. 111. This only applies to separate and self-acquired property; *Jan Mahomed* v. *Datu Jaffar* (1913), 38 Bom. 449; 15 Bom. L. R. 1044.

[3] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 242; 1 W. R. P. C. 1, at p. 5; *Mahomed Sidick* v. *Haji Ahmed* (1885), 10 Bom. 1, at pp. 9, 10; *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 347; *Sajan (Musst)* v. *Roop Ram* (1867), 2 Agra, 61; *Surmust Khan* v. *Kadir Dad Khan* (1865), Agra, F. B. 39 (edition 1874, p. 29); *Machhbai (Bai)* v. *Hirbai (Bai)* (1911), 35 Bom. 564. See *Jowala Buksh* v. *Dharum Singh* (1866), 10 M. I. A. 511, at pp. 537, 538; *Hakim Khan* v. *Gool Khan* (1882), 8 Calc. 826; 10 C. L. R. 603, doubting *Rup Chand Chowdhry* v. *Latu Chowdhry* (1878), 3 C. L. R. 97. As to caste customs, see *Jina (Bai)* v. *Kharwar Jina* (1907), 31 Bom. 366. When the Hindu law of inheritance applies, converts to Islam take with all the liabilities annexed to the estate, such as the payment of maintenance and debts; *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85; 6 Bom. L. R. 874.

[4] See *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (1889), 13 Bom. 534, and cases there cited. Khojas are governed by the Mayukha (*ante*, pp. 18, 19) with regard to inheritance and succession; *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85; 6 Bom. L. R. 874.

[5] *Mahomed Sidick* v. *Haji Ahmed* (1885), 10 Bom. 1, and cases there cited; *Saboo Sidick (Haji)* v. *Ally Mahomed Jan Mahomed* (1904), 30 Bom. 270; 6 Bom. L. R. 1135; *Moosa Haji Joonas Noorani* v. *Abdul Rahim (Haji)* (1905), 30 Bom. 197; 7 Bom. L. R. 447; S. C. in Court below, *Abdul (Haji)* v. *Hamid (Haji)* (1903), 5 Bom. L. R. 1010. This would also apparently apply to the Nassapooria Memons, see *Abdur Rahim* v. *Halimabai* (1915), 43 I. A. 35; 20 C. W. N. 362; 18 Bom. L. R. 635; and to the Bantwa Memons, *Safuran Umar* v. *Emna* (1916), 26 Kathiawar L. R. 174.

[6] *Baiji (Bai)* v. *Santok (Bai)* (1894), 20 Bom. 53.

Girasias.[1] It has been held [2] that the Hindu law of joint family property has no application to Cutchi Memons. For similar reasons it would not apply in the case of any Mahomedans. It has been held that the Lubbais, Tamil speaking converts to Islam in the district of Coimbatore, follow the rule of Hindu law, excluding females from inheritance.[3] As to Memons who have migrated to Africa, see *Abdur Rahim* v. *Halimabai* (1915), 43 I. A. 35 ; 20 C. W. N. 362 ; 18 Bom. L. R. 635.

Native Christians.

The Indian Succession Act [4] has brought under its provisions all native Christians, whether they have or have not elected to remain subject to the Hindu law.[5] In marriage and divorce also they cease by conversion to be governed by Hindu law.[6]

Illegitimate children.

Tho illegitimate children of Hindu parents are within the expression "Hindus."

It has been held that the illegitimate children of a Hindu mother by a European father are to be treated as Hindus, if they have been brought up as such,[7] but there is authority that where the mother is a non-Hindu the children cannot be treated as Hindus, even though the father is a Hindu.[8] In one case, however, the son of a Mahomedan concubine was brought up as a Hindu and treated as such by his father, and his father's family.[9]

Profession of Hinduism.

The mere circumstance that a man calls himself a Hindu is not sufficient to entitle him to the application of Hindu law,[10] but in some cases, where the parties have followed the rules of Hindu law, that law may be applied as a rule of equity and good conscience.[11]

Conversion to Hinduism is said to be common in Northern and Southern India.[12] Although the process of conversion may not be marked by any

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[1] *Fatesangji Jasvatsangji (Maharana Shri)* v. *Harisangji Fatesangji (Kuvar)* (1894), 20 Bom. 181 ; *Moosa Haji Joonas Noorani* v. *Abdul Rahim (Haji)* (1905), 30 Bom. 197 ; 7 Bom. L. R. 447.

[2] *Mangaldas* v. *Abdul Razak* (1914), 16 Bom. L. R. 224 ; *Advocate-General* v. *Jimbabai* (1915), 41 Bom. 181; 17 Bom. L. R. 799.

[3] *Ibrahim Rowther (Sheik)* v. *Muhamed Ibrahim Rowther* (1915), 39 Mad. 664.

[4] Act X. of 1865, s. 331.

[5] *Dagree* v. *Pacotti San Jao* (1895), 19 Bom. 783 ; *Ponnusami Nadan* v. *Dorasami Ayyan* (1880), 2 Mad. 209 ; *Joseph Vathiar of Nazareth* (1872), 7 Mad. H. C. 121; *Nepenbala Debi* v. *Sitikanta Banerjee* (1910), 15 C. W. N. 158.

[6] See Acts XV. of 1872 (Christian Marriage) ; IV. of 1869 (Divorce).

[7] *Myna Boyee* v. *Ootaram* (1861), 8 M. I. A. 400 ; 2 W. R. P. C. 4 ; S. C. on remand (1864), 2 Mad. H. C. 196. See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at p. 53.

[8] *Lingappa Goundan* v. *Esudasan* (1903), 27 Mad. 13. In that case the child was brought up as a Christian.

[9] *Sher Bahadur (Bhaiya)* v. *Ganga Baksh Singh (Bhaiya)* (1913), 41 I. A. 1; 36 All. 101; 18 C. W. N. 401; 16 Bom. L. R. 306.

[10] *Raj Bahadur* v. *Bishen Dayal* (1882), 4 All. 343, at p. 348.

[11] *Ibid.* See also *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 243 ; 1 W. R. P. C. 1, at p. 6. See *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342.

[12] *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342, at p. 349.

ceremonial acceptance, and is frequently a slow one, it seems possible throughout India, especially with regard to aborigines.[1]

Who are governed by particular schools of law.

As the Hindu law is a personal law, a Hindu is presumed to be governed by the school of law which governs the locality in which he resides.[2]

Families governed by law of origin.

If a Hindu migrates from one part of the country to another, the presumption is that he retains the laws and customs as to succession and family relations prevailing in the Province from which he came,[3] at the time of the migration,[4] and is not subject to the particular Hindu law administered in the place to which he migrates, or to the customs prevalent there,[5] even with regard to property which he inherits from a person who is governed by the law prevalent in the place to which he migrates.[6]

This presumption also applies to migration from French India to British India.[7]

Such presumption may be rebutted by proof that the

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[1] See Lyall's "Asiatic Studies," p. 104; Monier Williams' "Religious Thought and Life in India," pt. i. p. 57; W. J. Wilkins' "Modern Hinduism," p. 177; *Sher Bahadur (Bhaiya)* v. *Ganga Baksh Singh (Bhaiya)* (1913), 41 I. A. 1, at p. 14; 36 All. 101, at p. 116; 18 C. W. N. 401, at pp. 406, 407; 16 Bom. L. R. 306, at p. 316.

[2] *Ram Das* v. *Chandra Dassia* (1892), 20 Calc. 409; *Jugo Bundhoo Tewaree* v. *Kurum Singh* (1874), 22 W. R. C. R. 341.

[3] *Parbati Kumari Debi (Srimati Rani)* v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 433; 6 C. W. N. 490; 4 Bom. L. R. 365 (see this case as to evidence supporting this presumption); *Ambabai* v. *Govind* (1898), 23 Bom. 257, at p. 263; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81; 1 B. L. R. P. C. 26; 10 W. R. P. C. 35; *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448, at pp. 458, 459; 1 B. L. R. P. C. 44, at p. 46; 10 W. R. P. C. 31; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133, at p. 168; *Pudmavati (Rany)* v. *Doolar Singh (Baboo)* (1847), 4 M. I. A. 259; 7 W. R. P. C. 41; *Kulada Prasad Pandey* v. *Haripada Chatterjee* (1912), 40 Calc. 407; 17 C. W. N. 102; *Govind Chandra Das* v. *Radha Kristo Das* (1909), 31 All. 477; *Lukkea Debea* v. *Gungagobind Dobey*, W. R. 1864, C. R. 56; *Huropershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain* (1870), 13 W. R. C. R. 47; *Koomud Chunder Roy* v. *Seetakanth Roy* (1863), W. R. F. B. R. 75; *Sonatun Misser* v. *Ruttun Mallah* (1864), W. R. 1864, C. R. 95; *Ootum Chunder Bhuttacharjee* v. *Obhoychurn Misser* (1862), W. R. F. B. R. 67; S. C. *sub nomine Junaruddeen Misser* v. *Nobin Chunder Perdham*, Marshall, 232; *Ram Bromo Pandah* v. *Kaminee Soonduree Dossee* (1866), 6 W. R. C. R. 295; *Mailathi Anni* v. *Subbaraya Mudaliar* (1901), 24 Mad. 650. See *Chandika Bakhsh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 3 C. W. N. 425; 4 Bom. L. R. 376.

[4] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 162.

[5] See *Byjnath Pershad* v. *Kopilmon Singh* (1875), 24 W. R. C. R. 95.

[6] *Bhagabati Koer* v. *Sahudra Koer* (1911), 16 C. W. N. 834.

[7] *Mailathi Anni* v. *Subbaraya Mudaliar* (1901), 24 Mad. 650.

individual or his ancestors had adopted the law, usages, or religious ceremonies of the country of his residence.[1]

"It is not by looking merely at the performance of occasional local festivals that we can judge by what rule the family is governed. But we must look to the more important rites and ceremonies which are performed by them, namely, to those which attend births, marriages, and deaths in the family." [2]

Jains would ordinarily be governed by the Mitakshara school,[3] but it has been held that in the absence of evidence the Hindu law applicable in that part of the country in which they dwell would apparently be applicable.[4] Sastri G. C. Sarkar [5] says, "The Jainas of Bengal . . . are governed by the Mitakshara law of the country of their origin, and not by the Dayabhaga school prevailing here." Jains.

CUSTOM.

In administering the Hindu law, the Courts are required to give effect to a custom, *i.e.* to a rule in which a particular family [6] or in a particular caste or class,[7] or in a particular district,[8] has from long usage obtained the force of law.[9] Custom.

[1] See *Ram Bromo Pandah* v. *Kaminee Soonduree Dossee* (1866), 6 W. R. C. R. 295; *Parbati Kumari Debi* (*Srimati Rani*) v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82; 29 Calc. 433; 6 C. W. N. 490; 4 Bom. L. R. 365; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81, at p. 96; 1 B. L. R. (P. C.) 26, at p. 36; 10 W. R. P. C. 35, at p. 38; *Raj Chunder Narain Chowdry* v. *Goculchund Goh* (1801), 1 Ben. Sel. R. 43 (new edition, 56); *Ootum Chunder Bhuttacharjee* v. *Obhoychurn Misser* (1862), W. R. F. B. R. 67; S. C. *sub nomine Junaruddeen Misser* v. *Nobin Chunder Perdham*, Marshall, 232; *Chundro Seekhur Roy* v. *Nobin Soondur Roy* (1865), 2 W. R. C. R. 197.

[2] *Huro Pershad Roy Chowdhry* v. *Shibo Shunkuree Chowdhrain* (1870), 13 W. R. C. R. 47. See *Pudmavati* (*Rany*) v. *Doolar Sing* (*Baboo*) (1847), 4 M. I. A. 259; 7 W. R. P. C. 41; *Login* v. *Princess Victoria Gouramma of Coorg* (1862), 1 Ind. Jur., O. S. 109.

[3] *Mandit Koer* (*Mussammat*) v. *Phool Chand Lal* (1897), 2 C. W. N. 154.

[4] *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116, at p. 118.

[5] "Law of Adoption," p. 353.

[6] A family custom is called a *Koláchár*. See *Urjun Sing* (*Rawut*) v. *Ghunsiam Sing* (*Rawut*) (1851), 5 M. I. A. 169; *Gunesh Dutt Singh* (*Baboo*) v. *Moheshur Singh* (*Maharajah*) (1855), 6 M. I. A. 164; *Chintamun Singh* (*Chowdhry*) v. *Nowlukho Konwari* (*Mussamut*) (1875), 2 I. A. 263; 1 Calc. 153; 24 W. R. C. R. 255; *Nanaji Utpat* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249, at pp. 269, 270.

[7] For instance, the customs of the Nambhudri Brahmins; see *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157.

[8] A local custom is called *Desáchár*. Such custom is only applicable to persons domiciled in the place where it is in force; see *Padam Kumari* v. *Suraj Kumari* (1906), 28 All. 458.

[9] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at p. 585; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553.

"Under the Hindu system of law clear proof of usage will outweigh the written text of the law."[1]

In the following enactments this principle has been recognized by the Legislature:—

Bom. Reg. IV. of 1827, s. 26; Madras Civil Courts Act (III. of 1873), s. 16; Lower Burma Courts Act (XI. of 1889), s. 4; Central Provinces Laws Act (XX. of 1875), s. 5; Oudh Laws Act (XVIII. of 1876), s. 3; Punjab Laws Act (IV. of 1872), s. 5, as amended by Act XII. of 1878, s. 1.

Conditions of validity of custom.

The Courts cannot give effect to a custom unless it be ancient,[2] definite,[3] continuous,[4] notorious,[5] and reasonable.[6]

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[1] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R. P. C. 1, at p. 12; 10 W. R. P. C. 17, at p. 21; *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at pp. 55–58; *Nanaji Utpat* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249. See "Manu," chap. i. paras. 108, 110; chap. viii. paras. 41, 46; "Mitakshara," chap. i. s. 3, para. 4; "Dayatattwa," chap. i. para. 33; "Mayukha," chap. i. s. 1, para. 13. Dr. J. N. Bhattacharya ("Hindu Law," 2nd ed., pp. 50, 51) contends that according to the true translation of Manu's Code, custom does not prevail against an express provision of law.

[2] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553; S. C. in court below, *Sivananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 23.

[3] Or, as it may be expressed, certain, precise, and conclusive. *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Ramakanta Das Mahapatra* v. *Shamanand Das* (*Chowdhuri*) (1908), 36 I. A. 49; 36 Calc. 590; 13 C. W. N. 581; 11 Bom. L. R. 530; *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at pp. 195, 196; 19 W. R. C. R. 8, at p. 11; *Bhagawan Das* v. *Balgobind Sing* (1868), 1 B. L. R. S. N. ix.; *Doorga Pershad Singh* (*Tekaet*) v. *Doorga Kooeree* (*Tekaetnee*) (1873), 20 W. R. C. R. 154, at p. 157.

[4] In other words, uniform, uninterrupted, invariable. *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 24; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A. Sup. vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553; S. C. in Court below, *Sivananaja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254; *Soorendronath Roy* v. *Heeramonee Burmoneah* (1868), 12 M. I. A. 81, at p. 91; 10 W. R. P. C. 35, at p. 36; *Rajkishen Singh* (*Rajah*) v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 11; *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy* (*Sir*) (1886), 10 Bom. 528, at p. 543. See *Amrit Nath Chowdhry* v. *Gauri Nath Chowdhry* (1870), 6 B. L. R. 232, at p. 238; *Jameelah Khatoon* v. *Pegul Ram* (1864), 1 W. R. C. R. 250; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470, at p. 476.

[5] See *Juggomohun Ghose* v. *Manickchund* (1859), 7 M. I. A. 263, at p. 282; 4 W. R. P. C. 8, at p. 10; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254.

[6] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70; *Lutchmeeput Singh* v.

It is invalid if it be opposed to an express enactment of the Legislature,[1] to morality, to public policy,[2] or to justice, equity, and good conscience.[3] A custom must be established by clear and unambiguous proof,[4] and must be construed strictly.[5]

With the exception of an old decision in Calcutta,[6] by Grey, C.J., which fixed 1773 the date of the Act of Parliament which established the Supreme Court, and 1793 the date when Regulations commenced to be registered, as the time for the commencement of legal memory in Calcutta and the Mofussil respectively, there is no decision which has professed to define the expression "ancient." That expression is apparently coincident with the expression "from time immemorial." [7] Ancient.

Sadaulla Nushyo (1882), 9 Calc. 698, at p. 703; 12 C. L. R. 382, at p. 388.

[1] As, for instance, when the dedication of minors as dancing-girls of a pagoda amounts to an offence under ss. 372 and 373 of the Indian Penal Code (Act XLV. of 1860). *Ex parte Padmavati* (1870), 5 Mad. H. C. 415; *Queen Empress* v. *Ramanna* (1889), 12 Mad. 273; *Srinivasa* v. *Annasami* (1892), 15 Mad. 323; *Reg.* v. *Jaili Bhavin* (1869), 6 Bom. H. C. Cr. C. 60.

[2] *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168. See also *Sankaralingam Chetti* v. *Subban Chetti* (1894), 17 Mad. 479; *Ghasiti* v. *Umrao Jan* (1893), 20 I. A. 193; 21 Calc. 149. This is expressed by "Manu," chap. viii. para. 41, as "if they be not repugnant to the law of God."

[3] See *Vurmah Valiar* (*Rajah*) v. *Ravi Vurmah Mutha* (1876), 4 I. A. 76; 1 Mad. 235. Oudh Laws Act (XVIII. of 1876), s. 3; Punjab Laws Act (XII. of 1878), s. 1. As to marriage brocage contracts, see *post*, p. 52.

[4] *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570, at pp. 585, 586; I. A. Sup, vol. 1, at p. 3; 12 B. L. R. 396, at p. 398; 17 W. R. C. R. 553; S. C. in Court below, *Sivananañja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; *Nugendur Narain* (*Rajah*) v. *Rughoonath Narain Dey*, W. R. 1864, p. 20, at p. 23; *Serumah Umah* v. *Palathan Vitil Marya Coothy Umah* (1871), 15 W. R. P. C. 47; *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470. See *Amrit Nath Chowdhry* v. *Gauri Nath Chowdhry* (1870), 6 B. L. R. 232, at p. 238; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1869), 12 M. I. A. 523, at p. 542; 3 B. L. R. (P. C.) 13, at p. 19; 12 W. R. P. C. 21, at p. 24; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. A. C. 241; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 383.

[5] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259, at p. 285; 26 W. R. C. R. 55, at p. 70.

[6] Clarke's "Reports," pp. 113, 114 Sircar's "Vyavastha Darpana," 2nd ed., p. 314. The reason for this decision was that from the dates mentioned the powers of making laws were vested in the British Legislature. Sir G. D. Banerjee ("Law of Marriage," 3rd ed., p. 235), questions the correctness of the above-mentioned decision of Grey, C.J., and adds, "We may at any rate fairly say, that in the Hindu law, not only is it unnecessary to trace back the existence of a custom to any definite date, but even the indefinite condition of being ancient may, in favour of some classes of customs, have to be dispensed with." It certainly seems unreasonable thus to fetter the growth of customs, which are encouraged by the Hindu law, and which are a means by which that law can be adapted to modern requirements.

[7] See *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Umrithnath Chowdhry* v. *Gou-*

"What the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or district or country."[1] Such proof raises a presumption that the usage was an ancient one.[2]

Discontinuance of custom.

So far as continuity is concerned there seems to be a distinction between a family custom and a local custom. In the former case it is competent to the family to discontinue the custom, as, for instance, a custom of impartibility,[3] or it may have been accidentally discontinued.[4] In the latter case the omission of individuals to follow the custom could not have the effect of destroying it, as it is a part of the *lex loci*, and binds all persons within the local limits in which it prevails.[5]

A well-established custom in a family cannot be defeated by the fact that in one case the custom was not enforced.[6]

When the custom has been proved the burden is upon the party alleging the discontinuance to prove that fact.[7]

New grant of property formerly impartible.

A family custom that property should remain impartible, is not necessarily destroyed by a new grant being made by the Government to a member of the family,[8] but where a new tenure is created, and there is nothing in the circumstances under which the new grant was made to lead to the inference that the Government had in view in making the new grant the creation of an impartible zemindari as an exception to the ordinary rule of the Hindu law, the ordinary rules of Hindu law apply.[9]

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reenath Chowdhry (1870), 13 M. I. A. 542, at p. 549; 15 W. R. P. C. 10, at p. 12; S. C. in Court below, 6 B. L. R. 232.

[1] *Sivananaja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75, at p. 77; S. C. on appeal, *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570; I. A. Sup. vol. 1; 12 B. L. R. 396; 17 W. R. C. R. 553; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228, at p. 234. It was held in *Mahamaya Debi* v. *Haridas Haldar* (1914), 42 Calc. 455; 19 C. W. N. 208, that evidence showing exercise of a right in accordance with an alleged custom, as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.

[2] See *Ramasami* v. *Appavu* (1887), 12 Mad. 9, at p. 14; *Nanaji Utpat (Bhau)* v. *Sundrabai* (1874), 11 Bom. H. C. 249.

[3] It was assumed that such discontinuance was possible in *Lekhraj Kunwar (Thakurain)* v. *Harpal Singh (Thakur)* (1911), 39 I. A. 10; 34 All. 65; 16 C. W. N. 217; 14 Bom. L. R. 33.

[4] *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 12; *Sarabjit Partap Bahadar Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203.

[5] *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (1872), 1 Calc. 186, at p. 195; 19 W. R. C. R. 8, at p. 12.

[6] *Ekradeswar Singh* v. *Janeshwari Babuasin* (1914), 41 I. A. 275, at pp. 288, 289; 42 Calc. 582, at p. 606; 18 C. W. N. 1249, at p. 1259; 17 Bom. L. R. 18, at p. 31.

[7] *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203.

[8] See *Beer Pertab Sahee (Baboo)* v. *Rajender Pertab Sahee (Maharajah)* (1867), 12 M. I. A. 1; 9 W. R. P. C. 15; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290; *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Kachi Yuva Rangappa Kallakka Thola Udayar* v. *Kachi Kalyana Rangappa Kallakka Thola Udayar* (1901), 24 Mad. 562; upheld on appeal (1905), 32 J. A. 261; 28 Mad. 508; 10 C. W. N. 95; 7 Bom. L. R. 907.

[9] *Merangi, Zemindar of*, v. *Satrucharla Ramabhadra Razu (Sri Rajah)*

A family custom is personal, and does not apply to subsequent owners of the land held by the family.[1]

Immorality.

The following are illustrations of customs which have been held void for immorality:—

A custom allowing a woman to remarry during the lifetime of her husband and without his consent.[2]

A custom authorizing a husband or wife to divorce the other against his or her will, and without giving any reason, on condition only of a payment to the caste.[3]

A custom for dancing-girls to adopt daughters under circumstances which would amount to a traffic in minors as prohibited by ss. 372 and 373 of the Indian Penal Code;[4] but except where the recognition of the rights alleged would countenance such a traffic, or the usage is in itself immoral,[5] the Courts will give effect to the rights of dancing-girls attached to Hindu temples in respect of endowments for their support,[6] and also to the peculiar usages of the dancing-girl and prostitute classes with regard to adoption[7] and succession.[8]

There is nothing immoral or opposed to public policy in a tribal custom which requires a son-in-law to reside in the family of his father-in-law.[9]

A custom will not be applied unless those following the custom are convinced in conscience that they are acting in accordance with law.[10]

Judicial recognition.

Judicial recognition is not a condition precedent to the validity of a custom,[11] but such recognition may be of great value as evidence of the existence of that custom.[12]

(1891), 18 I. A. 45, at p. 53; 14 Mad. 237, at p. 245; *Venkata Narasimha Appa Row Bahadur (Rajah)* v. *Narayya Appa Row Bahadur (Rajah)* (1879), 7 I. A. 38; 2 Mad. 128; 6 C. L. R. 153.

[1] *Gopal Das Sindh* v. *Nurotum Sindh* (1845), 7 Ben. Sel. R. 195 (2nd ed., 230).

[2] *Post*, p. 63.

[3] *Keshav Hargovan* v. *Gandi (Bai)* (1915), 39 Bom. 513; 17 Bom. L. R. 584.

[4] Act XLV. of 1860.

[5] *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168.

[6] *Tara Naikin* v. *Nana Lakshman* (1889), 14 Bom. 90; *Kamalam* v. *Sadagopa Sami* (1878), 1 Mad. 356; *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 565. See *Chinna Ummayi* v. *Tegarai Chetti* (1876), 1 Mad. 168.

[7] *Post*, pp. 163, 164.

[8] *Tara Munnee Dossea* v. *Motee Buneanee* (1846), 7 Ben. Sel. R. 273 (2nd ed., 325); *Sivasangu* v. *Minal* (1889), 12 Mad. 277; *Kamakshi* v. *Nagarathnam* (1870), 5 Mad. H. C. 161.

[9] *Lenga Lalung* v. *Penguri Lalungni* (1915), 20 C. W. N. 406.

[10] *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250, at p. 254. See *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1891), 16 Bom. 470, at p. 476.

[11] See Mayne's "Hindu Law," 8th ed., pp. 56–58. In *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 424, Holloway, J., said, "A very short experience will suffice to satisfy any judge that a pundit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom." He proceeds to say, "And in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority." It is submitted that this last proposition cannot be supported.

[12] See Act I. of 1872, s. 42; *Shimbhu Nath* v. *Gayanchand* (1894), 16 All. 379.

Burden of proof of custom.

In the case of persons governed generally by the Hindu law, the burden of proving a custom derogatory to that law lies upon the person who asserts it.[1]

If it be shown that a custom applies to a particular class or community, the burden of showing that the individual member is not bound by it lies upon the person asserting such exception.[2]

In the case of a tribe or family which are not originally Hindu, but which has adopted Hinduism, the burden of proving that the family is governed in a particular matter by the Hindu law is upon the person who asserts that it is so governed.[3]

Where a custom prevails in one branch of a family, it is strong evidence that it applies with equal force to another branch of the same family.[4]

As to proof of the devolution of an impartible Raj, see *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459; 4 Bom. L. R. 372.

As to proof of the customs of Jains, see *Harnabh Pershad* v. *Mandil Dass* (1899), 27 Calc. 379.

As to the mode of proof of a custom, see Act I. of 1872, ss. 13, 32, 42, 48, 49.

"The kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced the right under the general law."[5] Decrees and an understanding in the family,[6] entries in village records, and answers to official inquiries,[7] declarations of the heads of families[8] are all evidence.

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[1] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 165; 21 All. 412, at p. 423; 3 C. W. N. 454, at p. 459; 1 Bom. L. R. 311; *Chandika Baksh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 6 C. W. N. 425; 4 Bom. L. R. 376; *Fanindra Deb Raikat* v. *Rajeswar Dass* (1885), 12 I. A. 72, at p. 81; 11 Calc. 463, at p. 476; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at p. 473; *Desai Ranchhoddas* v. *Rawal Nathubai* (1895), 21 Bom. 110, at pp. 116, 117; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 260; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 175; *Mahendra Singh (Rajah)* v. *Jokha Singh* (1873), 19 W. R. C. R. 211; *Jeetnath Sahee Deo (Thakoor)* v. *Lokenath Sahee Deo* (1873), 19 W. R. C. R. 239; and cases, *ante*, p. 29, note 4.

[2] See *Gitabai* v. *Shivbakas* (1902), 4 Bom. L. R. 376.

[3] As, for instance, the law of adoption, *Fanindra Deb Raikat* v. *Rajeswar Dass* (1885), 2 I. A. 72, at p. 81; 11 Calc. 463, at p. 476.

[4] *Lal Gajendra Nath Sahi Deo* v. *Lal Mathuralal Nath Sahi Deo* (1916), 1 Pat. L. J. 109.

[5] *Rama Nand* v. *Surgiani* (1894), 16 All. 221, at p. 223.

[6] *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459; 4 Bom. L. R. 372.

[7] *Parbati Kunwar* v. *Chandarpal Kunwar (Rani)* (1909), 36 I. A. 125; 31 All. 457; 13 C. W. N. 1073; 11 Bom. L. R. 890. As to a wajib ul arz, see *Anant Singh (Thakur)* v. *Durga Singh (Thakur)* (1910), 37 I. A. 191; 32 All. 363; 14 C. W. N. 770; 12 Bom. L. R. 504.

[8] *Hiranath Koer (Maharani)* v. *Ram Narayan Sing (Baboo)* (1872), 9 B. L. R. 224; 17 W. R. C. R. 316

CHAPTER I.

HUSBAND AND WIFE.

MARRIAGE.

THE relationship of husband and wife is created by a marriage, entered into by two persons, who are each competent, according to Hindu law, to enter into the state of marriage,[1] and who are not debarred by that law from intermarrying,[2] such marriage being performed with the ceremonies prescribed by that law.[3]

Creation of relationship.

According to Hindu ideas, marriage has for its object the performance of religious duties. It is a *sanskar*, that is, an essential ceremony, held indispensable to constitute the perfect purification of a Hindu.[4] It is the last of the ten *sanskars* necessary for the regeneration of males of the twice-born classes,[5] and is the only one prescribed for women and for *Sudras.*[6]

Object of marriage.

Marriage is essential to a Hindu in order that by begetting a son he may be delivered from the hell called *put*, to which the shades of a sonless man are, according to Hindu ideas, doomed,[7] that he may repay the debt he owes to his forefathers,[8] and that he may be able to perform some of the most important religious acts.[9]

Necessity for marriage.

It is the imperative religious duty of a father, or other guardian,[10] to cause a girl to be married, before she attains puberty, to a suitable husband, capable of procreating children.[11] There is, however, no legal obligation.[12]

Duty of guardian of girl.

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[1] *Post*, pp. 34–38.

[2] *Post*, pp. 38–46.

[3] *Post*, pp. 58–61.

[4] Wilson's "Glossary," p. 463.

[5] Colebrooke's "Digest," vol. iii., p. 104, note.

[6] Colebrooke's "Digest," vol. iii., p. 95. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318; *Kameswara Sastri* v. *Veeracharlu* (1910), 34 Mad. 422; *Srinivasa Iyangar* v. *Thiravengadathaiyangar* (1914), 38 Mad. 556.

[7] "Manu," chap. ix. para. 138; "Dayabhaga," chap. v. para. 6; "Dattaka Mimansa," chap. i. para. 5; Colebrooke's "Digest," vol. iii., pp. 158, 293, 294.

[8] "Dattaka Mimansa," chap. i. para. 5.

[9] Bhattacharya's "Hindu Law," 2nd ed., p. 81.

[10] As to the persons upon whom the duty devolves, see *post*, pp. 46–48.

[11] *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 78; 1 Calc. 289, at pp. 294, 295; 25 W. R. C. R. 235, at p. 236; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 322.

[12] *Sundari Ammal* v. *Subramania Ayyar* (1902), 26 Mad. 505.

Duty of guardian of boy.

Although the law permits the marriage of boys who have not attained majority,[1] and marriage is a religious necessity for them,[2] such marriages by male minors do not seem to have been contemplated by the sages and early writers on Hindu law.[3] There is, it is submitted, a moral or religious obligation upon a parent, or other guardian, to provide a wife for a boy, as there is to provide a husband for a girl,[4] and there is a right to provide for his marriage, and for its expenses.[5]

WHO MAY MARRY.

Who are competent to marry.

Unless expressly prohibited by a provision of the Hindu law, any male Hindu is competent to marry, and every unmarried Hindu female is competent to be given in marriage.[6]

A *garbari gosavi* [7] is competent to contract a valid marriage.[8]

The Hindu law regards the bridegroom as the person who marries, and the bride as the person who is taken in marriage.[9]

Defects.

Physical and mental defects, even if they be such as to cause exclusion from inheritance,[10] do not invalidate a marriage.[11]

Lunacy.

Unsoundness of mind does not invalidate a marriage.

"To put it at the highest, the objection to a marriage on the ground of mental incapacity must depend upon a question of degree." [12]

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[1] *Post*, p. 35.

[2] *Ante*, p. 33. *Sundrabai* v. *Shrinarayana* (1907), 32 Bom. 81; 9 Bom. L. R. 1366; *Gopalakrishnam* v. *Venkatanarasa* (1912), 37 Mad. 273.

[3] "Manu," chap. ix. para. 94; Bhattacharya's "Hindu Law," 2nd ed., pp. 81, 82. See Banerjee's "Law of Marriage," 3rd ed., p. 37.

[4] See *Kameswara Sastri* v. *Veeracharlu* (1910), 34 Mad. 422; *Sundrabai* v. *Shrinarayana* (1907), 32 Bom. 81; 9 Bom. L. R. 1366; *Gopalakrishnam* v. *Venkatanarasa* (1912), 37 Mad. 273, overruling *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206.

[5] *Kameswara Sastri* v. *Verracharlu* (1910), 34 Mad. 422; *Gopalakrishnam* v. *Venkatanarasa* (1912), 37 Mad. 273, overruling *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206, see *post*, pp. 52, 53.

[6] Banerjee's "Law of Marriage," 3rd ed., p. 34.

[7] These are a class of religious mendicants.

[8] *Gitabai* v. *Shivbakas* (1903), 5 Bom. L. R. 318.

[9] Banerjee's "Law of Marriage," 3rd ed., p. 35; Bhattacharya's "Hindu Law," 2nd ed., p. 81.

[10] As to the physical defects which cause exclusion from inheritance, see Bhattacharya's "Hindu Law," 2nd ed., pp. 349–351; Sarkar's "Hindu Law," pp. 232–235; Mayne's "Hindu Law," 8th ed., pp. 829–837, and cases there cited; *post*, pp. 52, 53.

[11] "Manu," chap. ix. para. 203; "Mitakshara," chap. ii. s. 10, paras. 9–11; "Vivada Chintamani" (P. C. Tagore's translation), p. 244; "Vyavahara Mayukha," chap. v. s. 11, para. 11, "Smriti Chandrika," chap. v. para. 32.

[12] *Mouji Lal* v. *Chandrabati Kumari (Musammat)* (1911), 38 I. A. 122, at p. 125; 38 Calc. 700, at p. 706; 15 C. W. N. 790, at p. 793; 13 Bom. L. R. 534, at p. 541.

Pundits both in Bengal [1] and Bombay [2] have given opinions that it does not invalidate a marriage. Sir G. D. Banerjee points out that "there are indications in the law from which it would appear that lunatics are considered competent to marry," [3] but he also says [4] that, as a lunatic is incompetent to accept the gift of a bride, it is not easy to understand how his marriage can be regarded as marriage at all.

The question of mental incapacity is one of degree. The Court will presume in favour of the validity of the marriage, and the legitimacy of the children.[5]

Impotence.

The ancient authorities permitted a eunuch to marry on the ground that his wife could raise up a son to him by a man legally appointed,[6] but now that the system of *niyoga* [7] is obsolete, it may be a question whether the Courts will not declare the marriage of an impotent person to be void.[8]

Age for marriage.

Except that in the case of the twice-born classes marriages cannot take place before investiture with the sacred thread,[9] a male Hindu of any age can marry.[10]

A female Hindu of any age can be given in marriage.[11]

The Hindu religion requires a girl to be given in marriage before she attains the age of puberty,[12] but there is nothing in the Hindu law to invalidate the marriage of a woman who has attained puberty.[13]

As to the necessity for the consent of a guardian in the case of the marriage of minors, see *post*, pp. 46–51

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[1] See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318; *Dabychurn Mitter* v. *Radhachurn Mitter* (1817), 2 Morl. Dig. 99.

[2] West and Bühler's "Hindu Law," 2nd ed., p. 274.

[3] "Law of Marriage," 3rd ed., p. 38; "Manu," chap. ix. para. 203; "Daya Bhaga," chap. v. para. 18; "Mitakshara," chap. ii. s. 10, paras. 9–11; "Vivada Chintamani" (P. C. Tagore's translation), p. 244; "Smriti Chandrika," chap. v. para. 32; "Vyavahara Mayukha," chap. iv. s. 11, para. 11.

[4] P. 39.

[5] *Mouji Lal* v. *Chandrabati Kumari* (*Musammat*) (1911), 38 I. A. 122; 38 Calc. 700; 15 C. W. N. 790; 13 Bom. L. R. 534.

[6] "Manu," chap. ix. para. 203; "Daya Bhaga," chap. v. para. 18.

[7] *Post*, pp. 45, 100, 139–141.

[8] See Banerjee's "Law of Marriage," 3rd ed., p. 40; Parasara, quoted in Vidyasagar's "Marriage of Hindu Widows," pp. 4, 7; Steele, p. 167; *Kanahi Ram* v. *Biddya Ram* (1878), 1 All. 549, at p. 551.

[9] The rule is that the investiture of a *Brahmin* should take place in the eighth, that of a *Kshatrya* in the eleventh, and that of a *Vaisya* in the twelfth year from his conception, "Manu," chap. ii. para. 36.

[10] Banerjee's "Law of Marriage," 3rd ed., p. 36. Bhattacharya's "Hindu Law," 2nd ed., p. 82. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318.

[11] Sir G. D. Banerjee ("Law of Marriage," 3rd ed., p. 45) says, "Ordinarily the lowest age for marriage is eight years, but Manu allows a girl to be married even before the proper age, if a proper union is secured" ("Manu," chap. ix. para. 88, and note by Kulluka).

[12] *Ante*, p. 33.

[13] Banerjee's "Law of Marriage," 3rd ed., p. 45.

Polygamy.

A Hindu[1] may at his pleasure marry any number of wives, although he has a wife or wives living.[2]

No effect can be given to an agreement purporting to avoid a marriage on the taking of a second wife during the lifetime of the first,[3] and apparently an agreement not to enter into such second marriage would be against the policy of the Hindu Law.[4]

Contracting a second marriage during the lifetime of the wife is called *adhivedana*, or supersession, but does not in any way imply that the first wife is deserted.[5]

The Hindu writers prescribe that a present (*adhivedanika*) should be given to the wife as compensation for her supersession, but they do not agree as to the amount.[6] Such compensation could not apparently be claimed in a Court of law.

Christian.

A Hindu, who has become a Christian, cannot take to himself another wife while his wife is alive.[7]

He can do so on his return to Hinduism.[8]

Bigamy of women.

A woman cannot marry another man while her husband is alive.[9]

Although the Courts will not recognize a custom which permits a wife at her pleasure to desert her husband and marry another man,[10] at

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[1] Even if he has at one time professed Christianity, 3 Mad. H. C. App. vii.

[2] See *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375; *Arumugam* v. *Tulukanam* (1883), 7 Mad. 187, at p. 188; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239; *Huree Bhaee Nana* v. *Nuthoo Koober* (1810), 1 Borr. 59; Banerjee, "Law of Marriage," 3rd ed., pp. 40, 136; "Daya Bhaga," chap. ix. para. 6, note; Sircar's "Vyavastha Darpana," p. 672. Polygamy is not permitted to members of the *Brahmo Somaj*; *Sonaluxmi* v. *Vishnuprasad Hariprasad* (1903), 28 Bom. 597; 6 Bom. L. R. 58.

[3] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[4] See *ibid.*, per Kemp, J., 11 B. L. R., at p. 135; 20 W. R. C. R., at p. 50. Would it not be, from the Hindu point of view, an agreement in restraint of marriage, and therefore void under s. 26 of the Indian Contract Act (IX. of 1872)?

[5] See "Mitakshara," chap. ii. s. 11, paras. 2 (note) and 35; *Emperor* v. *Lazar* (1907), 30 Mad. 550.

[6] See Banerjee's "Law of Marriage," 3rd ed., pp. 138, 139; "Mitakshara," chap. ii. s. 11, para. 35; "Dayakrama Sangraha," chap. vi. para. 31; Colebrooke's "Digest," vol. iii. p. 561.

[7] See *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235; *ante*, p. 23, note 6.

[8] *Emperor* v. *Anthony* (1910), 33 Mad. 371; (1866), 3 Mad. H. C. App. vii. See, however, *Emperor* v. *Lazar* (1907), 30 Mad. 550.

[9] *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239. "Manu," chap. viii. para. 226; chap. ix. paras. 46, 47, 71. See *Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169, at p. 173.

[10] *Narayan Bharthi* v. *Laving Bharthi* (1877), 2 Bom. 140; *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Reg.* v. *Karsan Goja* (1864), 2 Bom. H. C. 124; *Uji* v. *Hathi Lalu* (1870),

any rate where the first husband does not consent to the second marriage,[1] it would apparently give effect to a custom permitting such remarriage on desertion by the husband.[2] A custom authorizing such remarriage in case of the husband's leprosy might also be valid.[3] It has been held that a custom by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, the sole condition being the payment of a sum of money fixed by the caste, is bad.[4]

No effect could be given to the decision of a *panchayet* or of a caste which authorizes a remarriage,[5] except, perhaps, where by custom a valid divorce could be effected by such decision.[6]

Where divorce is permissible by custom,[7] or where a divorce has been decreed under Act XXI. of 1866,[8] a woman can remarry. **Remarriage after divorce.**

The marriage of a girl, who has been betrothed [9] (but not married) to another man, is valid.[10] **Betrothed girl.**

A widow can remarry.[11] **Remarriage of widow.**

As to the forfeiture of her rights on remarriage, see *post*, pp. 369, 370.

Except in the case of a special custom [12] the remarriage of widows was prohibited by the Hindu law, which was in force at the time of the passing of Act XV. of 1856.[13]

The Hindu law placed certain restrictions upon marriage by rules, which are now treated as operating only as moral injunctions. **Moral injunctions.**

Impurity arising from the birth or death of a relation was treated as a disqualification.[14]

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7 Bom. H. C. A. C. J. 133; *Reg.* v. *Manohar Raiji* (1868), 5 Bom. H. C. Cr. C. 17. See *In the matter of Chamia (Musst)* (1880), 7 C. L. R. 354.

[1] See *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381.

[2] *Virasangappa* v. *Rudrappa* (1885), 8 Mad. 440. See *Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169, at p. 173.

[3] See *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347, at p. 352.

[4] *Keshav Hargovan* v. *Gandi (Bai)* (1915), 39 Bom. 538; 17 Bom. L. R. 584.

[5] See *Bissuram Koiree* v. *The Empress* (1878), 3 C. L. R. 410, at p. 413; *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Emperor* v. *Ganga (Bai)* (1916), 19 Bom. L. R. 56.

[6] See *post*, pp. 63, 64.

[7] *Post*, p. 64.

[8] *Post*, p. 64.

[9] *Post*, pp. 58, 59.

[10] *Khimji Vassonji* v. *Narsi Dhanji* (1915), 39 Bom. 682; 17 Bom. L. R. 225; *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1835), 5 Ben. Sel. R. 315 (2nd ed., 369); *Khooshal* v. *Bhugwan Motee* (1813), 1 Borr. 138. See Act XV. of 1856, s. 1.

[11] Act XV. of 1856, s. 1.

[12] Strange's "Hindu Law," vol. ii. p. 400. As to such customs, see Mayne's "Hindu Law," 8th ed., pp. 113–117.

[13] "Manu," chap. v. paras. 157, 161; Strange's "Hindu Law," vol. i. pp. 37, 241, vol. ii. p. 400; Sircar's "Vyavastha Darpana," p. 647. In *Vithu* v. *Govinda* (1896), 22 Bom. 321, at p. 331, Ranade, J., says that the prohibition only extended to the three superior castes.

[14] See Banerjee's "Law of Marriage," 3rd ed., p. 106.

The marriage of a younger brother before an elder brother,[1] or of a younger sister before an elder sister,[2] was prohibited.

For other instances, see Banerjee's "Law of Marriage," 3rd ed., pp. 54, 55; Bhattacharya's "Hindu Law," 2nd ed., pp. 85, 86.

WHO MAY INTERMARRY.

Restrictions on intermarriage.

The following rules [3] as to identity of caste, exogamy, and prohibited degrees have been deduced from texts of the sages by Raghunandana,[4] who is said to be the highest authority in Bengal in all matters excepting inheritance,[5] and are reiterated by Kamalakara Bhatta in the *Nirnaya Sindhu*,[6] which is said to be of authority in the Benares school,[7] in the Bombay Presidency,[8] and in Southern India.[9]

Identity of caste.

1. Intermarriage between persons not belonging to the same primary caste is void.[10]

Subdivisions of caste.

This rule only prevents intermarriage between the four primary castes.[11] It does not prevent marriage between persons belonging to different subdivisions of the same primary caste.[12]

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[1] Banerjee's "Law of Marriage," 3rd ed., p. 42; Bhattacharya ("Hindu Law," 2nd ed., p. 83) says that this rule is imperative.

[2] Banerjee's "Law of Marriage," 3rd ed., p. 56.

[3] For a discussion of these rules, see Sarkar's "Hindu Law," 3rd ed., pp. 57–60.

[4] In his "Udvahatattwa."

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 36.

[6] Sarkar's "Hindu Law," 3rd ed., p. 92.

[7] *Ibid.*, Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[8] Mandlik's "Vyavahara Mayukha," Introduction, p. 73; Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[9] Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[10] *Padam Kumari* v. *Suraj Kumari* (1906), 28 All. 458; *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552; *Lakshmi* v. *Kaliansing* (1900), 2 Bom. L. R. 128; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Steele, pp. 26, 29, 30; Colebrooke's "Digest," vol. iii. p. 141; "Vyavastha Darpana," 656; Strange's "Hindu Law," vol. i. p. 40; "Mitakshara," chap. i. s. 11, para. 2, and note. See *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619. In that case the judges assumed that *Vaidyas* were Vaisyas. As to the position of Vaidyas, see Bhattacharya's "Hindu Castes and Sects," pp. 159–171; Risley's "Tribes and Castes of Bengal," vol. i. pp. 46–50.

[11] *Ante*, pp. 22, 23.

[12] *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at pp. 42, 43. See S. C. in Court below; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 483; *Upoma Kuchain* v. *Bholaram Dhubi* (1888), 15 Calc. 708; *Mahantawa* v. *Gangawa* (1909), 33 Bom. 693; 11 Bom. L. R. 822. See *Ramamani Ammal* v. *Kulanthai Natchear* (1871); 14 M. I. A. 346; 1 W. R. C. R. 1; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Sarkar's "Hindu Law," 3rd ed., p. 103. A contrary view was expressed in *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552, and by Mitter, J., in *Narain Dhara* v. *Rakhal Gain* (1875), 1 Calc. 1, at p. 4; 23 W. R. C. R

In the case of the marriage of an illegitimate person, who, strictly speaking, belongs to no caste, he or she must be treated as belonging to the caste the members of which have recognized him or her as a caste fellow.[1] Marriage of illegitimate persons.

A marriage between a Hindu and a Christian woman who had become a Hindu has been upheld.[2]

The question as to the effect of a marriage between a Hindu and a non-Hindu is not an easy one. Such a marriage when celebrated in England according to English forms may be effectual according to English law,[3] but in India the position is different. If the marriage be in accordance with the provisions of the Indian Christian Marriage Act,[4] it would be valid. The Hindu law did not contemplate any such marriages, and would not recognize them. If the marriage were attempted to be performed according to Hindu rites and ceremonies, it would apparently have no effect, but if it were performed according to other rites (*e.g.* Brahmo rites) the Court would apparently give effect to it. The inclination would be to support marriages, to which there could be no moral objection, to prevent children being rendered illegitimate, and to repudiate objections which however suited to ancient society have no application to modern times, when many people of divers communities and religions are to be found in India. The Court might well say that as there was no Hindu law dealing expressly with the subject, the case would be dealt with by principle of equity and good conscience. Legislation on this subject is much needed. Mixed marriages.

Marriages between members of different castes may be recognized by local custom.[5] Custom.

2. A member of one of the twice-born classes cannot marry the daughter of an agnate, *i.e.* of a person belonging to the same *gotra*,[6] or primitive stock, as himself.[7] Exogamy.

334, at p. 335. It is said that in Bengal the practice is in accordance with Mitter, J.'s, view in the above case (Banerjee's "Law of Marriage," 3rd ed., p. 75). As to Bombay, see Steele, pp. 29, 30. As to intermarriage between different sects of Lingayets, see *Fakirgauda* v. *Gangi* (1896), 22 Bom. 277. As to a family custom allowing intermarriage between sub-castes, see *Nugendur Narain (Rajah)* v. *Rughoonath Narain Dey*, W. R. 1864, C. R. 20, at p. 23.

[1] *In the matter of Ramkumari* (1891), 18 Calc. 264; *Emperor* v. *Madan Gopal* (1912), 34 All. 589. As to the daughter of a bastard, see *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141; 3 B. L. R. P. C. 1; 12 W. R. P. C. 41; S. C. in Court below; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478.

[2] *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342.

[3] *Chetti* v. *Chetti*, [1909] P. D. 67.

[4] Act XV. of 1872.

[5] See *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619. As to this case, see 7 C. W. N. pp. ccxxxvii. and ccxxxviii.

[6] Lit. cow-pen, *i.e.* a place in which cows were kept or protected from plundering attacks; Bhattacharya's "Law of the Joint Family," p. 113. For a discussion as to the origin of the term, see Max Muller's "Chips from a German Workshop," vol. ii. p. 28; Banerjee's "Law of Marriage," 3rd ed., pp. 56, 57; Sarkar's "Hindu Law," 3rd ed., p. 76.

[7] "Manu," chap, iii. para. 5; Steele, p. 160; Colebrooke's "Digest," vol. iii. p. 329; Banerjee's "Law of Marriage," 3rd ed., pp. 56, 57; Bhattacharya's "Hindu Law," 2nd ed., p. 88; Sircar's "Vyavastha Darpana," 2nd ed., p. 657.

This prevents a marriage between persons who are connected with a common ancestor entirely through males.

In this connection the expression *gotra* "means a family descended from one of the several patriarchs, who are, according to some, twenty-four, and according to others, forty-two in number."

There seems to be no certainty as to what are the gotras at the present day. Apparently there are eight primitive gotras descended from the seven Rishis, Viswamitra, Jamadagni, Bharadwaja, Gotama, Attri, Vasistha, Kasyapa, together with Agastya. The remaining gotras are possibly subdivisions of these eight, but are not all identifiable with them.[1]

"The theory of the gotra, as latterly described by Brahmanic writers, denies that either a Kshatriya, or a Vaisya, or a Sudra has a right to say that he belongs to a special gotra in the proper sense of the term."[2] Kshatriyas and Vaisyas have adopted the gotras of the spiritual guides or family priests of their remote progenitors.[3] It is also said that a man is prohibited from marrying a girl belonging to a gotra having the same pravaras or principal sages as his own.[4]

Prohibited degrees of relationship. Descendants of father and paternal ancestors.

3. A Hindu may not marry [5]—

(*a*) A female descendant as far as the seventh [6] degree from his father or from one of his father's six ancestors in the male line [7]

Sastri G. C. Sarkar, in his "Law of Adoption,"[8] says, "In fact the prohibited degrees for marriage are considered by the Sanskrit writers to constitute *sapindas* for the purpose of marriage, and they are different according to different sages. For instance, Vasishta declares that a man may marry a girl who is *fifth* and *seventh* on the mother's and father's sides respectively, whilst Paithinasi says that a damsel may be espoused who is beyond the *third* on the mother's and *fifth* on the father's side.[9]

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[1] See Bhattacharya's "Law of the Joint Family," pp. 111–113; Iswar Chandra Vidyasagur's "Widow Marriage," p. 193.

[2] Bhattacharya's "Law of the Joint Family," p. 111.

[3] *Ibid.*; Banerjee's "Law of Marriage," 3rd ed., p. 57; "Dattaka Mimansa," chap. ii. para. 76.

[4] Banerjee's "Law of Marriage," 3rd ed., p. 56, note 4; Colebrooke's "Digest," vol. iii. p. 329; Bhattacharya's "Hindu Law," 2nd ed., p. 88. See *Ramchandra* v. *Gopal* (1908), 32 Bom. 619, at p. 626; 10 Bom. L. R. 948.

[5] See *Minakshi* v. *Ramanadha* (1887), 11 Mad. 49, at p. 53. These rules are taken from Banerjee's "Law of Marriage," 3rd ed., pp. 59–62. In Bhattacharya's "Hindu Law," 2nd ed., p. 93, diagrams illustrating these rules will be found.

[6] In the calculation of prohibited degrees Hindu lawyers count both of the persons whose relationship is under consideration. So in this case, according to the English mode of calculation, the prohibition would end at the sixth degree. See *post*, p. 43, note 4.

[7] "Udvahatattwa," Raghunandana's "Institutes," vol. ii. p. 65, referred to in Banerjee's "Law of Marriage," 3rd ed., p. 62. See *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473; 4 Bom. L. R. 163. As to marriage with a half-sister's daughter, see *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at p. 177; 2 Mad. 270, at p. 279.

[8] P. 386.

[9] "Mitakshara," chap. i. para. 53.

But seven degrees on both sides appears to be prohibited by Manu, for he declares that a man must not marry a girl who is sapinda to his mother,[1] and lays down generally in another place that sapinda relationship ceases with the seventh ancestor." [2]

(*b*) A female descendant as far as the seventh degree from his father's *bandhus* [3] or from one of their six ancestors, through whom such female is related to him.[4]

Descendants from father's *bandhus*, and their ancestors.

These six ancestors would be the *bandhu's* mother, mother's father, mother's father's father, mother's father's father's father, mother's father's father's father's father, and mother's father's father's father's father's father. It does not include mother's mother, &c., as "a line of female ancestors is not regarded as a line in the Hindu law." [5]

(*c*) A female descendant as far as the fifth degree from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line.[6]

Descendants of maternal grandfather, and of his ancestors.

In the Presidency of Madras marriage with the daughter of a maternal uncle or of a paternal aunt is recognized by custom.[7]

According to some authorities a man cannot marry the daughter of an agnate of his maternal grandfather.[8]

(*d*) A female descendant as far as the fifth [9] degree from his mother's *bandhus*,[10] or from one of their four ancestors through whom such female is related to him.[11]

Descendants from mother's *bandhus* and their ancestors.

Where the *bandhu* in question is the son of the mother's maternal or paternal aunt, these four ancestors would be the *bandhu's* mother, mother's father, mother's father's father, and mother's father's father's father, and where the *bandhu* is the son of the mother's maternal uncle the four ancestors would be the father, father's father, father's father's father, and father's father's father's father.[12]

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[1] Chap. iii. para. 5.

[2] Chap. v. para. 60.

[3] A *bandhu* is a *sapinda*, related through a female.

[4] "Udvahatattwa," Raghunandana's "Institutes," vol. ii. p. 65, referred to in Banerjee's "Law of Marriage," 3rd ed., p. 62.

[5] Banerjee's "Law of Marriage," 3rd ed., p. 63.

[6] "Udvahatattwa," Raghunandana's "Institutes," vol. ii. p. 65, referred to in G. D. Banerjee's "Law of Marriage," 3rd ed., p. 63.

[7] Strange's "Hindu Law," vol. ii. p. 105. See note by Mr. Anand Charlu, "Calcutta Weekly Notes," vol. vii. pp. lxxxii., xc., xcviii.

[8] "Manu," chap. iii. para. 5. There seems to be a difference of opinion with regard to this note; see Bhattacharya's "Hindu Law," 2nd ed., pp. 91, 92; Sircar's "Vyavastha Darpana," 2nd ed., p. 658.

[9] See *ante*, p. 40.

[10] See above, note 3. This includes the sons of his mother's maternal aunt, the sons of his mother's paternal aunt, and the sons of his mother's maternal uncle.

[11] "Udvahatattwa," Raghunandana's "Institutes," vol. ii. p. 65, referred to in Banerjee's "Law of Marriage," 3rd ed., p. 63.

[12] Banerjee's "Law of Marriage," 3rd ed., p. 63.

Exceptions.

In spite of the above rules, a man may marry a girl who is removed by three *gotras* [1] from him, although she be related within the above degrees.[2]

"The three *gotras* in the case of the descendants of a *bandhu* are always to be counted from his (the *bandhu's*) own *gotra*. So also in the case of the descendants of the ancestors of a *bandhu*, who is the father's or the mother's maternal uncle's son, they are to be counted from the *bandhu's* own *gotra*. But in the case of the descendants of the ancestors of each of the other *bandhus*, the *gotras* are to be counted from his (the *bandhu's*) maternal grandfather's *gotra*." [3]

Sir G. D. Banerjee [4] gives the following illustration of the above rule:

"Suppose the paternal great-grandfather of the bridegroom to be of the *Sandilya gotra*; his daughter (by transfer of marriage) to be of the *Kasyapa gotra*; her daughter of the *Vatsya gotra*; and the daughter's daughter to be of the *Bharadwaja gotra*; the maiden daughter of this last, being of the *Bharadwaja gotra*, and being beyond three *gotras*, viz. the *Sandilya*, *Kasyapa*, and *Vatsya*, is eligible for marriage though within the prohibited degrees."

In practice these rules are, apparently, among all classes, not taken to exclude a *sapinda* girl beyond the fifth degree on the father's side, and the third degree on the mother's side,[5] but in strictness this relaxation of the rule is said to be limited to the Kshatriyas in all the forms of marriage, and to the other classes only in the *Asura*,[6] or other inferior forms of marriage.[7]

Origin of rules.

The above rules are enunciated by Sir G. D. Banerjee in his "Law of Marriage and Stridhan." They are based upon the interpretation put by Raghunandana upon the text of Manu. As so interpreted, the text prohibits a man from marrying a girl who is a *sapinda* [8] of his father or of his maternal grandfather.[9] This *sapinda* relationship ceases after the fifth or seventh degree from the mother and father respectively.[10] Yajnavalkya [11] also requires that a man should not marry his *sapinda*. This rule is common to all schools, but there is a diversity between the view

Difference between schools.

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[1] *I.e.* three females have intervened in the line between the man and the girl in question.

[2] Ragunandana's "Institutes," vol. i. p. 64, referred to in G. D. Banerjee's "Law of Marriage," 3rd ed., p. 64.

[3] G. D. Banerjee's "Law of Marriage," 3rd ed., p. 64.

[4] *Ibid.*

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 91, see *ante*, pp. 40, 41.

[6] *Post*, p. 55.

[7] G. D. Banerjee's "Law of Marriage," 3rd ed., pp. 64, 65; Sircar's "Vyavastha Darpana," 2nd ed., pp. 663, 664.

[8] "Manu," chap. iii. para. 5.

[9] See Bhattacharya's "Hindu Law," 2nd ed., p. 88.

[10] Yama, cited in the "Udvahatattwa," p. 7, referred to in Bhattacharya's "Hindu Law," 2nd ed., p. 88.

[11] I., 52.

entertained by the Mitakshara school [1] and that entertained by the Bengal school [2] as to the meaning of *sapinda* relationship.

Mitakshara school.

According to the Mitakshara [3] school a man cannot marry a girl if, their common ancestor being traced through his or her father, such common ancestor is not beyond the seventh [4] in the line of ascent from him or her, or, their common ancestor being traced through their mothers, such common ancestor is not beyond the fifth in the line of ascent from him or her.

Dr. J. N. Bhattacharya says,[5] "I must note also the fact that those who are governed by the Mitakshara school practically exclude, for purposes of marriage, only the four lines [6] that are considered ineligible by the Bengal school."

Custom.

As to local and family customs permitting intermarriage within the prohibited degrees, see Mayne's "Hindu Law," 8th ed., pp. 105, 106; Bhattacharya's "Hindu Law," 2nd ed., pp. 98, 99.

Stepmother's relations.

A man cannot marry his stepmother's brother's daughter, or daughter's daughter.[7]

The prohibition is based on a text of Sumantu,[8] which specifies these persons. According to a reading of the text, the Western schools exclude also the stepmother's sisters and their daughters, and some persons hold that *sapinda* relationship in the case of the stepmother is the same as in the case of the natural mother up to the fifth degree.[9]

Sastri G. C. Sarkar treats this rule of exclusion of certain of the stepmother's relations as being one of merely moral obligation, and as having no legal force.[10]

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1 According to the "Mitakshara" all the descendants of a common ancestor are *sapindas*, except that after the fifth ancestor on the mother's side, and after the seventh on the father's side, the relationship ceases. Bhattacharya's "Hindu Law," 2nd ed., p. 89.

2 According to the Bengal school the expression means connected by the offering of the funeral cake, but "For purposes relating to marriage, Raghunandana," who is the chief authority in that school on the subject of marriage, "has not given any importance to the definition of the term '*Sapinda*.' He has relied upon express texts to exclude girls within the seventh degree on the father's side, and the fifth degree on that of the mother. There are, however, passages in the 'Udvahatattwa,' in which the term '*Sapinda*' is taken to include in its denotation all agnates and cognates within the aforesaid limits." Bhattacharya's "Hindu Law," 2nd ed., p. 91.

3 See Bhattacharya's "Hindu Law, 2nd ed., p. 90.

4 In this computation both the common ancestor and the person in question must be taken into consideration. See *ante*, p. 40, note 6.

5 "Hindu Law," 2nd ed., p. 91.

6 The first of these lines include girls belonging to the same *gotra* (*ante*, pp. 39, 40). The second includes girls belonging to the *gotra* of the maternal grandfather of the bridegroom (*ante*, p. 41). The two other lines are comprised in the above rules.

7 "Udvahatattwa," Raghunandana's "Institutes," vol. ii. p. 66, referred to in G. D. Banerjee's "Law of Marriage," 3rd ed., p. 62.

8 Bhattacharya's "Hindu Law," 2nd ed., p. 95. Sumantu was the author of one of the Smritis.

9 Bhattacharya's "Hindu Law," 2nd ed., p. 95.

10 "Hindu Law," 3rd ed., p. 92.

Other rules of restriction.

There are other rules of restriction on intermarriage, which are now considered to be of mere moral obligation, and which are not universally observed.

The paternal uncle's wife's sister, and her daughter, and the wife's sister's daughter were excluded.[1] In all of these cases the marriage is valid in law.[2]

In former times a man could not marry the daughter of his spiritual guide or pupil,[3] or a girl bearing his mother's name,[4] or a girl older than him in age.[5]

Affinity.

Relationship by marriage does not *per se* operate as an impediment to a marriage. Thus a man can marry any relation of his wife whom he could have validly married if he was then marrying for the first time.[6]

Adopted son.

A son adopted according to the Dattaka form[7] cannot marry any one of the persons whom he would have been prohibited from marrying if he had remained in his natural family.[8] It is unsettled[9] whether he is also prohibited from marrying any one of the girls, whom he could not have married, had he been a natural-born son of his adoptive father,[10] or whether he is only prohibited from marrying a girl who belongs to the *gotra*

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1 Bhattacharya's "Hindu Law," 2nd ed., p. 95.

2 See Banerjee's "Law of Marriage," 3rd ed., p. 67; Bhattacharya's "Hindu Law," 2nd ed., p. 95; Sarkar's "Hindu Law," 3rd ed., p. 92. As to wife's sister's daughter, see *post*, note 6.

3 See Banerjee's "Law of Marriage," 3rd ed., p. 69; "Manu," chap. ii. para. 171; "Vyavastha Darpana," p. 665, note. Bhattacharya ("Hindu Law," 2nd ed., p. 96) treats this prohibition as still effectual, but a different view is adopted in Banerjee's "Law of Marriage," 3rd ed., p. 69, and in Sarkar's "Hindu Law," 3rd ed., p. 92. The reason for the rule seems to have ceased, as Vedic instruction is now usually of merely nominal duration.

4 "Udvahatattwa," referred to in Banerjee's "Law of Marriage," 3rd ed., p. 70.

5 "Yajnavalkya," i. 52. In practice this rule is never departed from; Banerjee's "Law of Marriage," 3rd ed., p. 70; Steele, 161.

6 See *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283, where it was held that a marriage between a Hindu and the daughter of his wife's sister is valid. Banerjee's "Law of Marriage," 3rd ed., p. 67; G. C. Sarkar's "Law of Adoption," p. 319.

7 *Post*, chap. iii.

8 *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 426; Banerjee's "Law of Marriage," 3rd ed., p. 65; G. C. Sarkar's "Law of Adoption," p. 387; Bhattacharya's "Hindu Law," 2nd ed., pp. 95, 96; "Dattaka Chandrika," s. 4, paras. 7–9; "Dattaka Mimansa," s. 6, para. 39; "Vyavahara Mayukha," chap. iv. s. 5, para. 30.

9 Bhattacharya's "Hindu Law," 2nd ed., pp. 95, 96.

10 This view is taken in Banerjee's "Law of Marriage," 3rd ed., p. 65, following the "Dattaka Chandrika," s. 4, paras. 7–9.

of his adoptive father, or is within three degrees of descent from the adoptive father and his two paternal ancestors.[1]

The latter view has been accepted by Nanda Pandita in the "Dattaka Mimansa," [2] and it is therefore to be supposed that it would be acceptable to the Benares, Maharashtra and Mithila schools.[3]

Where an adoption has been made by a widow, or by a wife in conjunction with her husband, an adopted son is prohibited from marrying a girl whom he could not have married had he been a legitimate son of his adoptive mother.[4]

Whether he is prohibited from marrying in the family of a wife of his adoptive father, who has not joined in the adoption, seems unsettled.[5]

As the Hindu law did not recognize the remarriage of widows, there are necessarily no rules providing for the case. Remarriage of widows.

It would seem that a widow cannot marry a person whose relationship to her is such that she could not have married him if she had never been married. It is said [6] that in order to ascertain what relatives of her first husband are forbidden to her in marriage reference should be made to the rules as to penance and appointment (*niyoga*), and to some special texts which pronounce certain relations as equal to mothers.

The rules in "Manu" as to penance would exclude a man from marrying the widow of his father,[7] of his son,[8] and of his *guru*.[9]

The application of the ancient rules of *niyoga* would apparently prevent a man from marrying the widow of his paternal or maternal grandfather, his father's widow, his father's or mother's sister, the widow of his paternal or maternal uncle, his father-in-law's widow, his sister or his daughter, his son's widow or daughter, or the widow of his *guru*.[10]

Vrihaspati [11] pronounces as equal to mothers, the mother's sister, the paternal and maternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother.

Among the Jats of the Province of Agra, marriage between a widow and her husband's brother is allowed.[12] Jats

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1 This view is taken in G. C. Sarkar's "Law of Adoption," p. 387, following the "Dattaka Mimansa," s. 4, paras. 32–38.

2 S. vi. paras. 32–38; see "Vyavahara Mayukha," chap. iv. s. 5, para. 30.

3 *Ante*, pp. 17, 19, 20.

4 See Banerjee's "Law of Marriage," 3rd ed., pp. 65, 66.

5 *Ibid.*; S. C. Sircar's "Vyavastha Darpana," 2nd ed., p. 890; "Dattaka Mimansa," s. 6, paras. 50–53.

6 See Bhattacharya's "Hindu Law," 2nd ed., p. 97. In *Lachman Kuar* v. *Mardan Singh* (1880), 8 All. 143, the Court held that, in the absence of a special custom, the marriage of a Hindu with his cousin's widow was valid.

7 "Manu," chap. xi. paras. 55, 104–107.

8 *Ibid.*, chap. xi. para. 59.

9 *Ibid.*, chap. xi. paras. 49, 252.

10 See G. C. Sarkar's "Law of Adoption," pp. 321, 322.

11 Cited in "Dayabhaga," chap. iv. s. 3, para. 31.

12 *Poorunmul* v. *Toolsee Ram* (1868), 3 Agra. 350.

Void marriage.

A marriage made within the prohibited degrees is void.[1]

The woman is entitled to receive maintenance from the man.[2]

The Hindu law did not permit a woman whose marriage was void on account of identity of gotra, or as being within the prohibited degrees, to marry again, even if the marriage was not consummated.[3] Where the marriage was void on account of difference of caste, the Hindu law, according to some authorities, allowed the woman to remarry if the error was discovered before the ceremony of *garbhadana*,[4] but not otherwise.[5] The case is unlikely to occur, but if it did, the Courts might decline to consider that a void marriage is any impediment to a subsequent marriage.[6]

Who may Give in Marriage.

Consent of guardian.

The gift of a female minor in marriage must be by, or with the consent of, her father or other guardian in marriage. The consent of the guardian is also necessary in the case of the marriage of a male minor.[7]

Where there is a gift by or with the consent of a legal guardian, and the marriage rite is duly solemnized, and where the marriage of a male minor takes place with the consent of such guardian, the marriage is irrevocable.[8]

For the purposes of marriage the age of majority, according to the Bengal school, is the end of the fifteenth year,[9] and according to the

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[1] Kullaka Bhatta's commentary on "Manu," chap. iii. paras. 5, 11; Bhattacharya's "Hindu Law," 2nd ed., p. 97; Banerjee's "Law of Marriage," 3rd ed., p. 66.

[2] Texts cited in Bhattacharya's "Hindu Law," 2nd ed., p. 97; Colebrooke's "Digest," vol. iii. p. 329; *Ramchandra* v. *Gopal* (1908), 32 Bom. 619; 10 Bom. L. R. 948.

[3] See Banerjee's "Law of Marriage," 3rd ed., p. 201; Bhattacharya's "Hindu Law," 2nd ed., p. 98; Colebrooke's Digest," vol. ii. p. 477; *Ramchandra* v. *Gopal* (1908), 32 Bom. 619, at p. 628; 10 Bom. L. R. 948.

[4] A ceremony performed on the first appearance of the menses, and popularly called the second marriage.

[5] Banerjee's "Law of Marriage," 3rd ed., p. 201; Steele, 29, 30, 166.

[6] See Banerjee's "Law of Marriage," 3rd ed., p. 191. *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243, at pp. 253, 254; 14 W. R. C. R. 403, at p. 405. If this view be not accepted, then, on the death of the husband, the woman could take advantage of the Hindu Widow's Remarriage Act (XV. of 1856, *ante*, p. 37).

[7] *Nundlal Bhugwandas* v. *Tapeedas* (1809), 1 Borr. 14; 1 Morl. 287; Steele, p. 26.

[8] *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 320. See *Kateeram Dokanee* v. *Gendhenee (Mussamut)* (1875), 23 W. R. C. R. 178.

[9] *Lachman Das* v. *Rupchand* (1831), 5 Ben. Sel. Rep., 115, 2nd ed., 136; *Cally Churn Mullick* v. *Bhuggobutty Churn Mullick* (1872), 10 B. L. R. 231; 19 W. R. C. R. 110; *Monsoor Ali* v. *Ramdyal* (1865), 3 W. R. C. R. 50; *Deobomoyee Dossee* v. *Juggessur Hati* (1864), 1 W. R. C. R. 75; *Luckheenarain Mujmodar* v. *Mudhosodun*, Ben. S. D. A., 1853, p. 505; *Sheebsunker Dass* v. *Uluck Chunder Aych*, Ben. S. D. A., 1859, p. 885.

schools of law based on the Mitakshara, the end of the sixteenth year.[1] The age of majority for the purpose of marriage is not affected by the Indian Majority Act.[2]

Devolution of guardianship in marriage.

The right, and duty, of giving a boy [3] or a girl in marriage devolves upon the following persons in succession [4] :—

1. The father.[5]
2. The paternal grandfather.
3. The brother.[6]
4. Other paternal relations up to the tenth degree of affinity [7] in order of proximity.

Right of mother.

According to the Mitakshara school, the right then devolves upon the mother, and, failing her, upon the maternal grandfather, maternal uncle, and other maternal relations in order of proximity. According to the Bengal school, the right of the mother is postponed to that of the maternal grandfather and maternal uncle.[8]

Where a relative, other than the father, seeks to exercise a right to give in marriage, it is his duty to consult the mother, and if her objection be not unreasonable, to allow it.[9]

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[1] Strange's "Hindu Law," vol. i. p. 72; vol. ii. pp. 76, 77, 80; Macnaghten's "Hindu Law," vol. i. chap. vii. (ed. 1829), p. 103.

[2] Act IX. of 1875, s. 2.

[3] See Macnaghten's "Hindu Law," vol ii. p. 204.

[4] Strange's "Hindu Law," vol. i. p. 36; vol. ii. p. 28; Macnaghten's "Hindu Law," vol. ii. p. 204; "Vyavastha Darpana," 2nd ed., p. 651; West and Bühler, 3rd ed., pp. 272, 673. See *Ram Bunsee Koonwaree (Maharanee)* v. *Soobh Koonwaree (Maharanee)* (1867), 7 W. R. C. R. 321, at p. 323; 2 Ind. Jur. N. S. 193; *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 484. It has been held in Madras (*Ranganaikimmal* v. *Ramanuja Aiyangar* (1911), 35 Mad. 728) that this refers only to the ceremonial act of giving, and not to the right of disposing, of the child in marriage, and that the mother was entitled to give her daughter in marriage; but in that case the marriage had been carried out (see *post*, p. 50). See *Ramkore (Bai)* v. *Jammadas Mulchand* (1912), 37 Bom. 18; 14 Bom. L. R. 766.

[5] *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110, at p. 118; *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R. 193; *Ex p. Jankypersaud Agurwallah* (1859), 2 Boul. 28, 114; *Nundlal Bhugwandass* v. *Tapeedass* (1809), 1 Borr. 14; 1 Morl. 287.

[6] *Ex p. Jankypersaud Agurwallah* (1859), 2 Boul. 28, 114. Strange's "Hindu Law," vol. ii. p. 30; Macnaghten's "Hindu Law," vol. ii. p. 204.

[7] As to the right of the paternal uncle, see *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 142; *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 484.

[8] Banerjee's "Law of Marriage," 3rd ed., p. 44; Bhattacharya's "Hindu Law," 2nd ed., p. 116; "Vyavastha Darpana," 2nd ed., p. 651; Strange's "Hindu Law," vol. ii. p. 28; Macnaghten's "Hindu Law," vol. ii. p. 28. See "Narada Smriti," chap. xii. paras. 20, 21. As to the right of the maternal uncle, see *Kasturi* v. *Panna Lal* (1916), 38 All. 520.

[9] See *S. Namasevayam Pillay* v. *Annammai Ummal* (1869), 4 Mad.

Stepmother.

A stepmother has no right to give in marriage.[1]

Consent of ward.

A minor cannot be married or given in marriage against his or her will.

Although it would rarely happen that a Hindu girl would be consulted as to the choice of a bridegroom, and although the form of a Hindu marriage contemplates a gift of the girl by her father or other guardian rather than a contract between the parties to the marriage, a bridegroom cannot be forced upon an unwilling bride.[2] The gift is made merely in discharge of the duty of the guardian, and not in exercise of any right of property in the girl.[3]

Delegation of right.

A father can,[4] expressly or by implication,[5] delegate his authority to another person.

It is submitted that no other guardian can delegate his right, except, perhaps, to a person on whom the right might eventually devolve, as in the case of *Ram Bunsee Koonwaree* (*Maharanee*) v. *Soobh Koonwaree* (*Maharanee*),[6] where the nearest male kinsman assented to the paternal grandmother giving the girl in marriage.

Loss of right.

A father or other guardian loses his right to give in marriage when he has neglected to exercise the right for a long time, or has in other ways waived the right.[7]

The conviction of the father does not necessarily destroy his right to give his daughter in marriage.[8]

Remedy of guardian.

A father or other guardian in marriage can enforce his right by suing for an injunction to prevent the marriage of his ward to a person of whom he does not approve,[9] and the

H. C. 339; *Ramkore* (*Bai*) v. *Jamnadas Mulchand* (1912), 37 Bom. 18; 14 Bom. L. R. 766.

[1] *Ram Bunsee Koonwaree* (*Maharanee*) v. *Soobh Koonwaree* (*Maharanee*) (1867), 7 W. R. C. R. 321; 2 Ind. Jur. 193.

[2] See *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480, at p. 4861. Colebrooke's "Digest," vol. ii. p. 481.

[3] See *Khushalchand Lalchand* v. *Bai Mani* (1886), 11 Bom. 247, at p. 255.

[4] *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R. 193.

[5] *Golamee Gopee Ghose* v. *Juggessur Ghose* (1865), 3 W. R. C. R. 193.

[6] (1867), 7 W. R. C. R. 321; 2 Ind. Jur. 193.

[7] See *Kasturi* v. *Panna Lal* (1916), 38 All. 520; *Khushalchand Lalchand* v. *Bai Mani* (1886), 11 Bom. 247; *King* v. *Kistnama Naick* (1814), 2 Str. N. C. 89; 1 Norton L. C. 1; *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194; *Ghazi* v. *Sukru* (1897), 19 All. 515; *Rulyat* (*Baee*) v. *Jeychund Kewul* (1843), Bellasis, 43; 1 Morl. (N. S.) 181. The fact that the father had given up worldly affairs, and had become a recluse would be evidence that he had waived his rights of guardianship.

[8] See *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110.

[9] See *In the matter of Kashi Chunder Sen* (1881), 8 Calc. 266, S. C. *Bromhomoyee* v. *Kashi Chunder Sen*, 10 C. L. R. 91; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247,

Court will in a suitable case grant an injunction *pendente lite* to restrain such marriage.[1]

The order of the Court may be subject to restrictions upon the exercise of the rights of the guardian.[2]

Control of guardian by Court.

The Court will restrain a guardian from an improper exercise of his authority; but the Court will not, except in a case of gross misconduct, interfere with the exercise of the discretion by a father.[3]

Guardian appointed by Court.

Where a guardian of the person or property of a minor has been appointed by a High Court, or by a Civil Court acting under the powers contained in Act VIII. of 1890, the rights of such guardian are subject to the control of the Court appointing him,[4] and such Court can, it is submitted, give all necessary directions with regard to the marriage of the ward,[5] at any rate where the person appointed or declared guardian would under Hindu law be the person entitled to give the minor in marriage.

Ward of Bengal Court of Wards.

Where a minor is a ward of the Bengal Court of Wards, the leave of such Court must be obtained before the marriage.[6]

Madras Court of Wards.

Whoever without the previous consent of the Courts of Wards abets the marriage of a minor ward of the Madras Court of Wards is liable on conviction before a Court of Session to a fine not exceeding Rs. 2000, or to imprisonment for a term not exceeding six months, or to both.[7]

When minor girl may select husband for herself.

The Hindu law permits a girl to choose a husband for herself, if there be no available relation having a right to give her in marriage,[8] or if her guardian in marriage has neglected to provide a husband for her for, at any rate, three years after she has attained a marriageable age.[9]

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at p. 253. In *Harendra Nath Chowdhury* v. *Brinda Rani Dassi* (1898), 2 C. W. N. 521, an injunction had been granted in a proceeding under the Guardians and Wards Act VIII. of 1890.

[1] *Nanabhai Ganpatrav Dhairyavan* v. *Janardhan Vasudev* (1886), 12 Bom. 110.

[2] See *Shridhar* v. *Hiralal Vithal* (1887), 12 Bom. 480.

[3] See *Shridhar* v. *Hiralal Vithal* (1887), 19 Bom. 480, at pp. 484, 485.

[4] See Act VIII. of 1890, s. 43.

[5] See Act VIII. of 1890, s. 43; *Harendra Nath Chowdhury* v. *Brinda Rani Dassi* (1898), 2 C. W. N. 521; Trevelyan's "Law of Minors" (5th ed.), p. 248. Doubted in *Diwali (Bai)* v. *Moti Karson* (1896), 22 Bom. 509, at p. 513; see Wilson's "Anglo-Muhammadan Law," 4th ed., p. 198.

[6] Court of Wards Rules, s. viii. (e) rule 5. The only penalty, apparently, for a disobedience of this rule is that the Court might refuse to authorize payment of the expenses of the marriage out of the ward's funds.

[7] Act I. (M. C.) of 1902, s. 67.

[8] "Narada," chap. xii. paras. 20–22. "Yajnavalkya," i. 63.

[9] Strange's "Hindu Law," i. 36. "Manu," chap. ix. paras. 90, 91. Colebrooke's "Digest," vol. ii. p. 387. According to "Gautama" (xviii. 20–23), she need only wait three months. The marriageable age is said to be the completion of the eighth year. Banerjee's "Law of Marriage," 3rd ed., p. 51. See "Manu," ix. 89.

In the former case the Hindu law required the girl to obtain permission from the King before selecting a husband for herself.[1] Although the Law Courts now exercise the functions relating to minors, which were formerly exercised by the Sovereign in person, no such application to the Court seems to be contemplated by modern practice.

The case would not be likely to occur, but effect would apparently be given to a marriage entered into by a girl who has no relations entitled to give her in marriage, provided the marriage be in other respects unexceptionable.

In the case of the guardian neglecting to give the girl in marriage, the right of the guardian next in order would apparently accrue,[2] rather than that the girl should be able to select a husband for herself.[3]

It is said that, if a girl chooses a husband for herself, she cannot take with her any ornaments which have been given to her by her father, mother, or brothers.[4]

Effect of absence of consent of guardian in marriage.

A marriage, otherwise legally contracted, and performed with the necessary ceremonies, is not rendered invalid by the mere absence of the consent of the guardian in marriage.[5]

"There is no case . . . in which the marriage of a Hindu girl effected without force and fraud by her relations has, after it has actually taken place, been declared to be invalid for want of the consent of the legal guardian." [6]

The rule would not, however, apparently prevent the Court setting aside a gift of a girl in marriage by a person having no pretence of authority.[7]

The circumstance that a marriage was contracted in disobedience of an order of a Civil Court would not render it invalid.[8]

Powers of Court.

The Courts have power to declare that a marriage, which has been entered into without the consent of the guardian, is on that account invalid, and would probably do so, at any rate if the marriage has not been consummated, in a case where the interests of the child had been disregarded, and where a person

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[1] "Narada," xii. 22. "Yajnavalkya," i. 63.

[2] See *ante*, p. 47.

[3] See Strange's "Hindu Law," i. 36.

[4] "Manu," ix. 92.

[5] *Ghazi* v. *Sukru* (1897), 19 All. 515; *Kasturi* v. *Chiranji Lal* (1913), 35 All. 265; *Mulchand Kuber* v. *Bhudia* (1897), 22 Bom. 812; *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247; *Brindabun Chandra Kurmokar* v. *Chandra Kurmokar* (1885), 12 Calc. 140; *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194; *Rulyat* (*Baee*) v. *Jeychund Kewul* (1843), Bellasis 43; 1 Morl. Dig. N. S. 181.

[6] *Kasturi* v. *Chiranji Lal* (1913), 35 All. 265, at p. 269.

[7] See Banerjee's "Law of Marriage," 3rd ed., p. 52.

[8] *Diwali* (*Bai*) v. *Moti Karson* (1896), 22 Bom. 509.

having no pretence of authority had disposed of the child in marriage.[1]

Where the marriage has been induced by force or fraud,[2] it would on that account be declared to be invalid, apart from any question as to the want of consent by the guardian.[3]

There would be great difficulties in setting aside a marriage which had been consummated, and in any case it would be difficult to obtain a bridegroom for a Hindu girl who had already gone through the form of marriage with another person.

Consent to remarriage of minor widow.

A minor[4] widow whose marriage has not been consummated cannot remarry without the consent of her father, or, if she has no father, of her paternal grandfather; or if she has no such grandfather, of her mother; or, failing all these, of her elder brother; or failing also brother, of her next male relative. Marriages made without such consent may be declared void by a Court of Law, but the consent is to be presumed until the contrary is proved, and no such marriage can be declared void after it has been consummated.[5]

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient consent to constitute her marriage valid.[6]

Agreement to pay money to guardian.

A father or other guardian cannot enforce an agreement to recompense him in consideration of the marriage of his child or ward, although the marriage be in the *asura*[7] form.[8]

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[1] See *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243; 14 W. R. C. R. 403; Banerjee's "Law of Marriage," 3rd ed., p. 52. See, however, *Mulchand Kuber* v. *Bhudhia* (1897), 22 Bom. 812; *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247.

[2] *I.e.* fraud on the person marrying, or being given in marriage. Mere fraud on the guardian such as in *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, where the mother falsely stated that she had the father's permission, would not of itself invalidate the marriage; see *Khushalchand Lalchand* v. *Mani* (*Bai*) (1886), 11 Bom. 247.

[3] *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 311, at p. 320; *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243, at p. 254; 14 W. R. C. R. 403, at p. 405; *Mulchand* v. *Bhudhia* (1897), 22 Bom. 812, at pp. 817, 818.

[4] *I.e.* minor according to "Hindu Law," *ante*, pp. 46, 47.

[5] Hindu Widow Remarriage Act (XV. of 1856), s. 7. This would not interfere with the jurisdiction of the Court to set aside a marriage which had been brought about by force or fraud exercised upon the widow (see above).

[6] Hindu Widow Remarriage Act (XV. of 1856), s. 7.

[7] *Post*, p. 55.

[8] *Gulabchund* v. *Fulbai* (1909), 33 Bom. 411; *Baldeo Das Agarwalla* v. *Mohamaya Persad* (1911), 15 C. W. N. 447; *Venkata Kristnayya* (*Kalavagunta*) v. *Lakshmi Narayana* (*Kalava-

The Allahabad High Court holds that each case must be judged by its circumstances.[1]

The father or other guardian can recover money which he has paid as the consideration for a marriage which has not taken place.[2]

Payment to bridegroom.

There is no objection to a payment of money by the guardian of a girl to the proposed bridegroom in consideration of the marriage.[3]

Marriage brocage contract.

A contract, whereby a person undertakes for reward to bring about a marriage, cannot be enforced.[4]

Marriage expenses.

The property of a joint family governed by the Mitakshara school of law is liable for the reasonable[5] expenses of the marriages of the daughters of male members of such family,[6] including the daughters of those who are excluded from inheritance.

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gunta), (1908), 32 Mad. 185; *Devarayan Chetty* v. *Mutturaman Chetty* (1912), 37 Mad. 393; *Dholidas Ishvar* v. *Fulchand* (1897), 22 Bom. 658; *Dulari* v. *Vallabdas Pragji* (1888), 13 Bom. 126. See *Pitamber Ratansi* v. *Jagjivan Hansraj* (1884), 13 Bom. 131.

[1] *Baldeo Sahai* v. *Jumna Kunwar* (1901), 23 All. 495, following *Visvanathan* v. *Saminathan* (1889), 13 Mad. 83. See *Vaithyanatham* v. *Gangarazu* (1893), 17 Mad. 9; *Ram Chand Sen* v. *Audaito Sen* (1884), 10 Calc. 1054. *Lallun Monee Dossee* (*Ranee*) v. *Nobin Mohun Singh* (1875), 25 W. R. C. R. 32; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395; 14 W. R. C. R. 154; *Juggernath Persad* v. *Janky Persad* (1859), 2 Boul. 28; Bhattacharya's "Hindu Law," 2nd ed., pp. 101, 102. "Manu" says (iii. 51), "Let no father, who knows the law, receive a gratuity, however small, for giving his daughter in marriage, since the man who through avarice takes gratuity for that purpose is a seller of his offspring," but the practice is very common.

[2] *Ramchand Sen* v. *Audaito Sen* (1884), 10 Calc. 1054; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395, 14 W. R. C. R. 154; *Rambhat* v. *Timmayya* (1892), 16 Bom. 673; *Malji Thakersey* v. *Gomti* (1887), 11 Bom. 412; *Gulabchand* v. *Fulbai* (1909), 33 Bom. 411; 10 Bom. L. R. 649. See Indian Contract Act (IX. of 1872), s. 65.

[3] See Indian Contract Act (IX. of 1872), s. 65, illus. (*a*).

[4] *Vaithyanatham* v. *Gangarazu* (1893), 17 Mad. 19; *Pitamber Ratansi* v. *Jagjivan Hansraj* (1884), 13 Bom. 131. See *Dulari* v. *Vallabdas Pragji* (1888), 13 Bom. 126, at p. 130; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395, 14 W. R. C. R. 154.

[5] In *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1902), 26 Mad. 497, the Court only allowed the expenses of ceremonies which invariably formed part of the marriage ceremonies, and disallowed the expenses of ceremonies which were usually, though not invariably, performed. It is submitted that greater latitude should be allowed to a guardian. The "Mitakshara" (chap. i., s. 7, paras. 5–14), and the "Viramitrodaya" (chap. ii., Part I. s. 24), provide for the dowry and marriage expenses of a daughter one-fourth of what she would have been entitled to receive if she had been a son, see *Churaman Sahu* v. *Gopi Sahu* (1909), 13 C. W. N. 994, at p. 997; Sarkar's "Hindu Law," 3rd ed., p. 245.

[6] See *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512. Indian Contract Act (IX. of 1872), s. 69.

These expenses have been held to include a gift on the occasion of the *dwiragaman* or *gowna* ceremony which takes place subsequent to the marriage.[1] The Madras High Court has held that where a mother gave her daughter in marriage against the wish of her husband's father she was nevertheless entitled to be repaid the expenses out of the family property.[2]

The expenses of the marriage of a male member of a family must also be paid out of the family property.[3]

In the case of a joint family governed by the Bengal school of law the marriage expenses of the daughters of the co-sharers, and of persons who are excluded from inheritance, and of other unmarried female members of the family, such as daughters of adult sons of co-sharers, would be payable out of the family property.[4]

Liability of father.

A father is not, in the absence of a contract, under a legal liability to pay the marriage expenses of any of his children,[5] but after his death the reasonable expenses of the marriages of his daughters are payable out of his estate.[6]

Such expenses create a charge upon the property to the same extent as rights of maintenance create a charge,[7] and to such extent only.

Grandfather.

There is also authority that the estate of a deceased Hindu is liable for the expenses of the marriage of the daughter of a son who pre-deceased him.[8]

Payment out of infant's property.

Where a ward has separate property a guardian would be entitled to pay thereout the reasonable expenses of his ward's marriage.[9]

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[1] *Churaman Sahu* v. *Gopi Sahu* (1909), 13 C. W. N. 994.

[2] *Ranganaikimmal* v. *Ramanuja Aiyangar* (1911), 35 Mad. 728.

[3] *Sundrabai* v. *Shivnararayana* (1907), 32 Bom. 81; 9 Bom. L. R. 1366; *Bhagirathi* v. *Jokhu Ram Upadhia* (1910), 32 All. 575; *Kameswari Sastri* v. *Veeracharlu* (1910), 34 Mad. 422; *Gopalakrishnam* v. *Venkatanarasa* (1912), 37 Mad. 273, dissenting from *Govindarazulu Narasinhan* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206; *Narayana* v. *Ramalinga* (1915), 39 Mad. 587. The expenses of a second marriage will in some cases be payable out of the property, *Bhagirathi* v. *Jokhu Ram Upadhia* (1910), 32 All. 575.

[4] Sarkar's "Hindu Law," 3rd ed., pp. 106, 107.

[5] *Sundari Ammal* v. *Subramania Ayyar* (1902), 26 Mad. 505.

[6] *Preaj Nurain* v. *Ajodhyapurshad* (1848), 7 Ben. Sel. R. 513, 2nd ed., 602; *Gunput Lall (Lalla)* v. *Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R. 52. See *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36, at p. 37; 6 C. L. R. 429, at 430.

[7] See *post*, pp. 89–92.

[8] *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429.

[9] *Juggessur Sircar* v. *Nilambur Biswas* (1865), 3 W. R. C. R. 217; *Makundi* v. *Sarabsukh* (1884), 6 All. 417, at p. 421. See *ante*, p. 52, note 5.

FORMS OF MARRIAGE.

Forms of marriage now recognized.

The only forms of marriage now recognized by the general Hindu law are the *Brahma* form and the *Asura* form. Both forms are now applicable to all classes.

Where money is not paid for the bride the marriage is said to be in the *Brahma* form. Where there is a bride price the marriage is said to be in the *Asura* form.[1]

Ancient forms of marriage.

The ancient Hindu law allowed the following eight different forms of marriage.[2] The first four of these were considered approved forms.

1. The *Brahma*.[3]

Brahma.

This form of marriage originally contemplated the gift of the girl by her father to a man learned in the *Vedas*,[4] and was, therefore, peculiar to Brahmins.

It is the only one now left of the four approved forms of marriage, and is now suitable for all classes.[5]

2. The *Daiva*.[6]

Daiva.

In this form, which was peculiar to Brahmins, the maiden was given in marriage to the officiating priest.[7]

3. The *Arsha*.[8]

Arsha.

In this form the father gave his daughter in consideration of one or two pair of oxen.[9] It was peculiar to Brahmins.

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[1] *Hira* v. *Hansji Pema* (1912), 37 Bom. 295; 14 Bom. L. R. 1182; *Chunilal* v. *Surajram* (1909), 33 Bom. 433; 11 Bom. L. R. 708; *Authikesavulu Chetty* v. *Ramanujam Chetty* (1909), 32 Mad. 512, at p. 517.

[2] See "Manu," chap. iii. paras. 21–41; "Yajnavalkya," i. 58–61; "Narada," chap. xii. paras. 39–54; Colebrooke's "Digest," vol. iii. 604. "The different forms of marriage recognized by the Hindu law are probably to be traced historically to the customs of different tribes which afterwards coalesced to form a single community," per West, J., in *Viiiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 254.

[3] So called because peculiarly fit for Brahmins; Colebrooke's "Digest," vol. iii. p. 604.

[4] "Manu," chap. iii. para. 27.

[5] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14; *Sivarama Casia Pillay* v. *Bagavan Pillay*, Mad. S. D. for 1859, p. 44, cited in Norton's "Leading Cases," Part I. p. 5.

[6] Lit. divine: so called as being a ceremony proper for the gods.

[7] "Manu," iii. 28. Colebrooke's "Digest," vol. iii. p. 604.

[8] Lit. scriptural, anything for which a *Rishi* is an authority; Wilson's "Glossary," p. 32.

[9] "Manu," chap. iii. para. 29.

4. The *Prajapatya* or *Kaya*.[1]

In this form the bridegroom was an applicant for the bride. It was peculiar to Brahmins.[2] *Prajapatya.*

5. The *Asura*.[3]

In this form the bridegroom purchased the bride from her father.[4] The only difference between this form and the *Arsha* form is that in this form property other than cattle is taken by the father of the bride.[5] The mere giving of a present to the bride does not render the marriage an *Asura* marriage.[6] Although there may be *Brahma* ceremonies, where there is a "bride price," the marriage is an *Asura* marriage.[7] *Asura.*

This form of marriage was permissible to *Vaisyas* and *Sudras*, but not to the two highest classes.[8] It is now applicable to all classes[9] and seems to be commonly practised throughout India. It is said to be, in fact, the most common form of marriage,[10] at any rate among Sudras in Southern India,[11] and members of the Bhandari and other inferior castes in Western India.[12]

6. The *Gandharba*.[13]

This form depended solely upon the mutual consent of the parties marrying. It was confined to the *Kshatriyas* or military class,[14] and seems to have been effected by mere consummation.[15] Although this form of marriage is not recognized by the general Hindu law, a form of that name is permitted in some cases by family usage. In a case decided by the Bengal Sudder Court in 1817, a marriage by a member of the military *Gandharba.* Allowed by custom.

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[1] So called as being the ceremony of the *Kas* or *Prajapatis*, the lords of created beings or progenitors of mankind; "Manu," chap. i. para. 34; chap. iii. para. 30.

[2] See Banerjee's "Law of Marriage," 3rd ed., p. 82.

[3] Lit. demoniacal; Wilson's "Glossary;" p. 37. "It is called the *Asura* form, as being the ceremony of the *Asuras*, or the aboriginal non-Aryan tribes of India." Banerjee's "Law of Marriage," 3rd ed., p. 83.

[4] "Manu," chap. iii. para. 31.

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 104.

[6] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 15. "Manu," chap. iii. para. 54.

[7] *Chunilal* v. *Surajram* (1909), 33 Bom. 433; 11 Bom. L. R. 708. See *ante*, p. 54.

[8] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14. Colebrooke's "Digest," vol. iii. p. 604. Steele, p. 31.

[9] *Visvanathan* v. *Saminathan* (1889), 13 Mad. 83. See *Keshow Rao Diwakur* v. *Naro Junardhun Patunkur* (1821), 2 Borr. 194; *Nundlal Bhugwandas* v. *Tapeedas* (1810), 1 Borr. 14. As to Western India, see *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

[10] Banerjee's "Law of Marriage," 3rd ed., p. 83. Strange's "Hindu Law," i. 43.

[11] See Mayne's "Hindu Law," 8th ed., pp. 99, 100.

[12] *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

[13] The name is taken from that of "a kind of inferior divinity attendant upon Indra and Kuvera, and distinguished for musical proficiency." Wilson's "Glossary," p. 164.

[14] See "Manu," chap. iii. paras. 32, 41.

[15] Sarkar's "Hindu Law," 3rd ed., p. 84.

class in this form was recognized,[1] and the same Court, in 1853,[2] upheld a similar marriage by a Rajah of Julpigoree, who belonged to an aboriginal tribe, which had to some extent adopted Hindu customs.[3]

This form of marriage is said to exist still in the family of the Tipperah Rajahs,[4] and it was recently asserted to have taken place in a family in Ganjam.[5] A religious ceremony is now as necessary in a marriage in this form as when the marriage takes place in the ordinary forms.[6] The Gandharba form of marriage as now celebrated, and the ancient form seem, therefore, to resemble one another in name only

7. The *Rakshasa.*[7]

Rakshasa.

This was a marriage by capture,[8] and would in the present day be dealt with by the criminal law.[9] It was peculiar to the Kshatriyas, or warrior class.[10]

8. The *Paisacha,*[11]

Paisacha.

In this form the Hindu law for the sake of the woman and her offspring treated as a marriage a seduction by fraud.

Customary form of marriage.

Where by immemorial and continuous custom[12] a form of marriage, which is not repugnant to the fundamental principles

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[1] *Hujmu Chul* v. *Bhadoorun* (*Ranee*), referred to in Ben. S. D. A. 1846, p. 340, and 7 Ben. Sel. R. 355 (new edition, pp. 355, 356).

[2] *Mokrund Deb Raekut* v. *Bissessuree* (*Ranee*), Ben. S. D. A. 1853, p. 159.

[3] See *Fanindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463.

[4] See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194.

[5] *Brindavana* v. *Radhamani* (1888), 12 Mad. 72. A marriage in this form was also asserted in *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Maha Devi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369; S. C. on appeal, *Radhika Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) (1870), 13 M. I. A. 497; 6 B. L. R. 202; 14 W. R. P. C. 33.

[6] *Brindavana* v. *Radhamani* (1886), 12 Mad. 72; *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Maha Devi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369, at p. 374. See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194; *Bhaoni* v. *Maharaj Singh* (1881), 3 All. 738.

[7] Lit. a fiend-like marriage. See Wilson's "Glossary," p. 436.

[8] "The seizure of a maiden by force from her house while she weeps and calls for assistance, after her kinsmen and friends have been slain in battle or wounded, and their houses broken open, is the marriage styled *Rakshasa.*" "Manu," chap. iii. para. 33.

[9] Indian Penal Code (Act XLV. of 1860), s. 366.

[10] *Jaikisondas Gopaldas* v. *Harkisondas Hullochandas* (1876), 2 Bom. 9, at p. 14.

[11] Lit. diabolical. Wilson's "Glossary," p. 389. "When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage called *Paisacha* is the eighth and basest." "Manu," iii. para. 34.

[12] See *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298; 13 W. R. C. R. 179; "Manu," iii. 35. As to the necessary conditions for the validity of a custom, see *ante*, pp. 28, 29.

of Hindu law, is invariably practised by a particular class of persons or family, a marriage in such form is valid.

In the case of a family or race which is not Hindu by origin, but which has gradually, or otherwise, more or less adopted Hindu customs or Hindu law, a custom at variance with Hindu law would be upheld,[1] provided that it were not repugnant to general ideas of morality.

Forms of marriage according to family usages.

The following forms of marriage peculiar to individual families have (amongst others) been recognized by the Courts :—

In the Raj family of Hill Tipperah, marriage takes place in the *Gandharba* [2] or *Santigrihita* [3] form, but the wife married in that form seems to be inferior to a wife married in accordance with the ordinary form.[4]

A Rajah of Orissa can marry a girl of a different caste in what is called the *phulbiha* form, which consists in putting a garland round the neck of the woman, or in an exchange of garlands.[5]

The *Sagai* form,[6] by which widows of the *Namosudra* caste,[7] and of the *Koiries* and other low castes in Behar,[8] and of the *Hulwaee* caste,[9] remarry.

The *Kurao Dhureecha,* or the marriage of a widow with her deceased husband's brother, is common among Jats [10] and the *Lodh* caste [11] in the North-West.

The *Serai Udiki* [12] form, by which wives, deserted by their husbands, can remarry according to the custom of the Lingaits of South Canara.[13]

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1 See *Fanindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463.

2 See *ante*, p. 55.

3 Lit. one who receives holy water.

4 See *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194; *Nobodip Chundro Deb Burmun* (*Rajkumar*) v. *Bir Chundra Manikya Bahadoor* (*Rajah*) (1876), 25 W. R. C. R. 404, at pp. 410, 414.

5 As to the customs of the Urya Rajahs and Chiefs, see the *Pachis Siwal,* or twenty-five questions put by the superintendent of the Tributary Mehals in 1814 to the leading Rajahs in those Mehals. These answers have been recognized by the Courts, *e.g.* see *Prandhur Roy* v. *Ramchender Mongraj*, Ben. S. D. A. 1861, p. 16; *Durrap Sing Deo* v. *Buzzurdhun Roy* (1863), 2 Hay. 335; *Rungadhur Nurendra Mardraj Mahapattur* v. *Juggurnath Bhromurbor Roy* (1877), I Shome's "Law Reporter," C. R. 92, at p. 95. The substance of the answers is given in Banerjee's "Law of Marriage," 3rd ed., pp. 242, 243.

6 In this form the main ceremony consists in putting a red or *Sindur* mark on the bride's forehead in the presence of assembled friends and relatives. *Bissuram Koiree* v. *Empress* (1878), 3 C. L. R. 410.

7 *Hurry Churn Dass* v. *Nimai Chand Keyal* (1883), 10 Calc. 138; 13 C. L. R. 207. See *Jukni* v. *Queen Empress* (1892), 19 Calc. 627.

8 *Bissuram Koiree* v. *Empress* (1878), 3 C. L. R. 40.

9 *Kally Churn Shaw* v. *Dukhee Bibee* (1879), 5 Calc. 692.

10 *Poorunmul* v. *Toolsee Ram* (1868), 3 Agra. 350; *Queen* v. *Bahadur Singh* (1872), 4 N. W. P. 128.

11 *Kesaree* v. *Samardhan* (1873), 5 N. W. P. 94.

12 Giving a cloth.

13 *Virasangappa* v. *Rudrappa* (1885), 8 Mad. 440.

As to the Sikh forms of marriage, see *Juggomohun Mullick (Doe dem)* v. *Saumcoomar Bebee* (1815), 2 Morl. Dig. 43; Anand Marriage Act (VII. of 1909).

As to forms of marriage which are recognized by local, tribal, or family custom, see Banerjee's "Law of Marriage," 3rd ed., Lecture VI.; Bhattacharya's "Hindu Law," 2nd ed., pp. 105, 111, 112; Risley's "Tribes and Castes of Bengal"; Crooke's "Tribes and Castes of the North-Western Provinces and Oudh"; Mayne's "Hindu Law," 8th ed., pp. 121–125.

As to the marriage of Hindus domiciled in the Madras Presidency following the Marumakkatayan or the Aliyasantana law of inheritance, see Madras Act IV. of 1896.

Among the Nairs of Malabar there is a form of marriage called "*Sanbandham.*" There are no ceremonies. It is dissoluble at the will of either party. The wife and children acquire no rights of maintenance or inheritance. It does not seem to have been recognized by the Courts,[1] but it has been recognized by the Legislature in permitting registration of such marriages.[2]

The Travancore Legislative Council has passed the Nair Regulation recognizing the present custom of presentation of cloth by a bridegroom to the bride as a legal form of marriage among Nairs.

New sect.

Where "a new Hindu sect comes into existence, and, from religious scruples, adopts a form of marriage somewhat different to the ordinary form, it would be going too far to hold that these marriages are void, and thus to bastardize a whole community, simply because the sect and its practices are of recent origin."[3]

The Provisions of the Marriage Act (III. of 1872) apparently apply to the Progressive Brahmos, but have no reference to the Adi or Conservative Brahmos who claim to be Hindus.

Marriage Ceremonies.

Betrothal.

It is usual, but not necessary, that marriage should be preceded by a betrothal, or formal promise by the father, or other guardian,[4] to give the girl in marriage.[5] Such betrothal

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[1] 15 C. W. N. cclx.

[2] Malabar Marriage Act (IV. of 1896, M. C.), s. 3.

[3] Banerjee's "Law of Marriage," 3rd ed., p. 235. As to the marriage of Brahmos, see *ibid.*, pp. 100, 104, 105, 264, 265, and *Sonaluxmi* v. *Vishnuprasad Hariprasad* (1903), 28 Bom. 597; 6 Bom. L. R. 58, where a bigamous marriage of members of the Brahmo Samaj was held to be invalid. See *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342.

[4] *Ante*, pp. 46, 47.

[5] This is called *vagdana*, or gift by word. Banerjee's "Law of Marriage," 3rd ed., p. 87; Wilson's "Glossary," p. 538.

is revocable,[1] and is not, in law, any obstacle to a marriage with another man.[2]

A promise of marriage cannot be enforced by a suit for specific performance,[3] but a refusal to complete a betrothal or a promise of marriage by an actual marriage would give to the injured party a right to recover from the person making the promise compensation for the loss, if any, sustained by the breach of promise.[4] In case of such breach, a father, or guardian, would be entitled to recover money properly expended in contemplation of such marriage.[5] Such suits cannot be brought in a Provincial Small Cause Court.[6] Effect of breach of promise.

Should the betrothed damsel die before the marriage, the bridegroom is entitled to recover back the presents given by him to her, subject to paying such expenses as have been incurred.[7] Death of bride.

There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies.[8] Necessity for ceremonies.

Even when the *gandharba* form of marriage [9] is permissible by custom the Courts will not recognize it unless religious rites have been performed, although the gift of the bride is in a marriage in that form unnecessary.[10]

Hindu law does not recognize a marriage contracted by a Hindu, otherwise than with Hindu ceremonies, as, for instance, while he is a convert to another religion.[11]

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[1] See *In the matter of Gunput Narain Singh* (1875), 1 Calc. 74; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122; Sircar's "Vyavastha Darpana," 2nd ed., pp. 645, 646. Steele, 24, 160. Banerjee's "Law of Marriage," 3rd ed., pp. 53, 87–89.

[2] *Ante*, p. 37.

[3] Act I. of 1877 (Specific Relief), s. 21, cl. *b*. See illustration to that section, "A contracts to marry B." See *In the matter of Gunput Narain Singh* (1875), 1 Calc. 74; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122.

[4] Act IX. of 1872 (Contracts), s. 73. *Purshotamdas Tribhovandas* v. *Purshotamdas Mangaldas Nathubhoy* (1896), 21 Bom. 23; *Mulji Thakersey* v. *Gomti* (1887), 11 Bom. 412; *Umed Kika* v. *Nagindas Narotamdas* (1870), 7 Bom. H. C. (O. C.) 122, at p. 136. See *Noubut Singh* v. *Lad Kooer (Mussumat* (1873), 5 N. W. P. 102; *In the matter of Gunput Narain Singh* (1875), 1 Calc. 74, at p. 76. A person not a party to the contract is not liable: *Jekisondas* v. *Ranchoddas* (1916), 41 Bom. 137.

[5] "Mitakshara," chap. ii. s. 11, para. 28; *Rambhat* v. *Timmaya* (1892), 16 Bom. 673; *Jogeswar Chakrabatti* v. *Panch Kauri Chakrabatti* (1870), 5 B. L. R. 395.

[6] Act IX. of 1887, Sched. II., art. 35; *Kali Sunker Dass* v. *Koylash Chunder Dass* (1888), 15 Calc. 833.

[7] "Mitakshara," chap. ii. s. 11, paras. 29, 30; "Daya-Krama-Sangraha," chap. ii., s. 1, para. 1.

[8] See Banerjee's "Law of Marriage," 3rd ed., pp. 99, 100, 105, and texts and other authorities there cited. Sircar's "Vyavastha Darpana," 2nd ed., p. 650. Strange's "Hindu Law," vol. i. p. 42.

[9] *Ante*, pp. 55, 56.

[10] *Brindavana* v. *Radhamani* (1888), 12 Mad. 72; *Hari Krishna Devi Garu (Sri Gajapaty)* v. *Radhika Patta Mahadevi Garu (Sri Gajapaty)* (1865), 2 Mad. H. C. 369, at p. 374. See Strange's "Hindu Law," vol. i. p. 42. Sircar's "Vyavastha Darpana," 2nd ed., p. 650.

[11] *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342, at pp. 348, 349.

Nature of ceremonies.

The ceremonies vary according to local or family or caste [1] usage.

The ceremonies which are usually performed [2] are described in detail by H. T. Colebrooke,[3] and in lesser detail in Banerjee's "Law of Marriage" [4] and in Bhattacharya's "Hindu Law." [5] See also Risley's "Tribes and Castes of Bengal," vol. i. pp. 148–152.

Usual ceremonies.

The ceremonies usually commence with the performance of the *nandimukh*, or *vriddi shradda*, by the bride's father in honour of his ancestors,[6] and the ceremonious bathing of the bride. On the bridegroom coming to the house he is ceremoniously received, and certain ceremonies, the most important of which is the gift of the bride to the bridegroom,[7] are observed. On the night of that day, or on the day following, the operative marriage ceremonies are performed by the bridegroom and bride. This is called *panigrahana*, or the acceptance of the bride's hand by the bridegroom. The sacred fire is kindled and oblations are made. The bridegroom takes the bride's hand, she steps on a stone. The bridegroom recites a fixed text. A hymn is chanted. The bride and bridegroom walk round the fire, and then comes the most material of the marriage rites. The bride is conducted by the bridegroom, and directed by him to step successively into seven circles, a text being recited at each step. This is called *Saptapadi*. On the taking of the seventh step, and not until then, the marriage is complete and irrevocable.[8] The bride thenceforth becomes a member of her husband's family.[9]

Other ceremonies which are not essential to the validity of the marriage are subsequently performed.[10]

Conditional marriage.

Sata (exchange) marriage, which, according to the custom of the *Kudwa Kunbi* caste, is conditional upon the bridegroom's father providing a

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[1] (1866), 3 Mad. H. C. App. vii.

[2] These ceremonies are observed whether the marriage be strictly in the *Brahma* form, or whether, in consequence of a payment having been made to the bride's family, the marriage is in the *Asura* form; Banerjee's "Law of Marriage," 3rd ed., p. 94; *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 319; *Chunilal* v. *Surajram* (1909), 33 Bom. 433; 11 Bom. L. R. 708; *Authikesavulu Chetty* v. *Ramanujam Chetty* (1909), 32 Mad. 512.

[3] Essay III. on the Religious Ceremonies of the Hindus and of the Brahmins especially, "Asiatic Researches," vol. vii. p. 288.

[4] 3rd ed., pp. 95–98.

[5] 2nd ed., chap. viii.

[6] The performance of this *sradh* is not essential; *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 142.

[7] This transfers the guardianship of the girl.

[8] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at p. 143. See *Venkatacharyulu* v. *Rangacharyulu* (1890), 14 Mad. 316, at p. 318. Colebrooke's Essay on the Religious Ceremonies of the Hindus, "Asiatic Researches," vol. vii. p. 303. Strange's "Hindu Law," vol. i. p. 37. Strange's "Manual," para. 38. "Manu," chap. viii. para. 227. Colebrooke's "Digest," vol. ii. pp. 487, 488.

[9] Bhattacharya's "Law of the Joint Family," pp. 140, 141.

[10] For instance, see *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1902), 26 Mad. 497.

girl to be married to the son of the bride's father, does not take effect until the condition has been performed, although the marriage ceremonies have been completed.[1]

Whatever words spoken, ceremonies performed, or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage can be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.[2]

Remarriage of widow.

Although certain ceremonies are usual when the wife attains puberty, consummation is not necessary to the validity of a Hindu marriage.[3]

Consummation.

There may be a custom by which a ceremony is necessary on the wife obtaining puberty.[4]

DISPUTES AS TO MARRIAGE.

The Courts have power to determine the validity of a marriage either in a suit properly constituted for that purpose, or in a suit or proceeding in which the question incidentally arises.[5]

Jurisdiction to determine validity of marriage.

For instance, the question may arise in a suit for the possession of property, or for the restitution of conjugal rights, or in a proceeding relating to the guardianship of a minor, or as to the right to letters of administration, or in a criminal prosecution for bigamy, or adultery, or for enticing away a married woman.

A suit will lie for a declaration that the defendant was not, as he or she alleged himself or herself to be, the husband, or wife, of the plaintiff.[6]

Suit for jactitation of marriage.

A decision as to the fact or validity of a marriage can only bind the parties to the litigation,[7] and then only if the case complies with the conditions prescribed by s. 11 of the Civil Procedure Code, 1908.[8]

Only binds parties.

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[1] *Ugri (Bai)* v. *Purshottam Bhudar (Patel)* (1892), 17 Bom. 400.

[2] Hindu Widow's Remarriage Act (XV. of 1856), s. 6.

[3] *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466, at p. 470; *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301, at p. 311; Strange's "Hindu Law," vol. ii. 32, 33.

[4] *Boolchand Kollta* v. *Janokee* (1876), 25 W. R. C. R. 386.

[5] See *Aunjona Dasi* v. *Prahlad Chandra Ghose* (1870), 6 B. L. R. 243; 14 W. R. C. R. 403.

[6] See *Mir Azmat Ali* v. *Mahmud-ul-nissa* (1897), 20 All. 96.

[7] See *Bromhomoyee* v. *Kashi Chunder Sen* (1881), 8 Calc. 266; 10 C. L. R. 91.

[8] Act V. of 1908; cf. Act XIV. of 1882, s. 13. See Evidence Act (I. of 1872), s. 43.

Presumption as to validity of marriage.

Where it has been proved that a marriage has been celebrated there is a presumption that it is valid in law,[1] and that all the necessary ceremonies were performed.[2]

A strong presumption arises when the parties are recognized by all persons concerned as man and wife, and so described in important documents and on important occasions.[3]

Suit for restitution of conjugal rights.

It has been held by a Bench in the Bengal High Court[4] that this presumption, although it applies to questions of inheritance, does not apply to a suit for restitution of conjugal rights, and that in such a suit the performance of the ceremonies must be strictly proved, but in an earlier case another Bench of the same Court[5] applied the presumption to a similar suit. It is submitted that there is no valid reason for making this distinction. Evidence of treatment is sufficient to prove a marriage, even in a suit for restitution of conjugal rights, where the parties are not subject to the Indian Divorce Act,[6] which, of course, Hindus are not, so *à fortiori*, evidence of the marriage having been celebrated would, it is submitted, be sufficient.

Widow.

This presumption applies also in the case of the remarriage of a widow.[7]

It has no application when a former valid subsisting marriage of the woman has been proved.[8]

Presumption as to form of marriage.

There is also a presumption even among *Sudras*[9] that the

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[1] *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1, at pp. 3, 4; 12 W. R. P. C. 41, at p. 42; *Mouji Lal* v. *Chandrabatti Kumari (Musammat)* (1911), 38 I. A. 122; 38 Calc. 700; 15 C. W. N. 790; 13 Bom. L. R. 534; *Fakirgauda* v. *Gangi* (1896), 22 Bom. 277, at p. 279. As to the proof of a marriage, see *Luchmi Koer* v. *Roghunath Das (Chowdhry Mohunt)* (1900), 27 I. A. 142; 27 Calc. 971; 4 C. W. N. 685. Act I. of 1872, s. 50. See *Muthusami Mudaliar* v. *Masilamani* (1909), 33 Mad. 342.

[2] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at pp. 142, 143; *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466, at pp. 469, 470. "If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they are duly completed, until the contrary is shown." *Diwali (Bai)* v. *Moti Karson* (1896), 22 Bom. 509, at p. 512.

[3] *Mouji Lal* v. *Chandrabatti Kumari (Musammat)* (1911), 38 I. A. 122; 38 Calc. 700; 15 C. W. N. 790; 13 Bom. L. R. 534; *Bepin Behary Das Bairagi* v. *Atul Krishna Das Bairagi* (1911), 17 C. W. N. 494.

[4] *Surjyamoni Dosi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 50; 5 C. W. N. 195, at pp. 204, 205.

[5] *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar* (1885), 12 Calc. 140, at pp. 142, 143.

[6] Act I. of 1872 (Evidence), s. 50; see *Chellammal* v. *Ranganatham Pillai* (1910), 34 Mad. 277; *Mouji Lal* v. *Chandrabatti Kumari (Musammat)* (1911), 38 I. A. 122; 38 Calc. 700; 15 C. W. N. 790; 13 Bom. L. R. 534.

[7] *Lachman Kuar* v. *Mardan Singh* (1886) 8 All. 143.

[8] *In re Millard* (1887), 10 Mad. 218, at p. 221.

[9] *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545; *Trikumdas Damodhar* v. *Haridas Morarji* (1907), 31 Bom. 583, at p. 587.

marriage was according to one of the approved forms.[1] As the *Brahma* form is the only one remaining of such forms,[2] it follows that there is a presumption that the marriage was in accordance with the *Brahma* form.[3]

Offences relating to marriage.

In prosecutions under ss. 494, 495, 497, and 498 of the Indian Penal Code[4] the fact[5] and validity[6] of the marriage must be strictly proved.[7]

DIVORCE.

Divorce is unknown to the general Hindu law.[8]

Divorce.

Divorce is allowed by custom in certain localities and among certain low castes.[9] Such custom will not be recognized if it is immoral or contrary to public policy.[10]

As to the castes and localities in which such custom exists, see Steele's "Law and Custom of Hindu Castes," pp. 168, 169; Risley's "Tribes and Castes of Bengal;" Crooke's "Tribes and Castes of the North-Western Provinces and Oudh;" Banerjee's "Law of Marriage," 3rd ed., pp. 248–250, 257; Mayne's "Hindu Law," 8th ed., pp. 115–117.

Where it is allowed by custom, a divorce by mutual agreement is recognized by law.[11]

Although matters of divorce are frequently adjudicated upon by a *panchayet*, or assembly of a caste, such *panchayet* has no power to declare a marriage void or to give permission to a woman to remarry.[12] In such

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[1] *Thakoor Deyhee (Mussumat)* v. *Rai Baluk Ram* (1866), 11 M. I. A. 139, at p. 175; 10 W. R. P. C. 3, at p. 9; *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354, at p. 360; *Gojabai* v. *Maloji Raje Bhosle (Shrimant Shahajirao)* (1892), 17 Bom. 114, at p. 117; *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1873), 11 B. L. R. 286, at p. 288; 16 W. R. C. R. 105, at p. 106; *Kaithe* v. *Kulladasi Koundan*, Mad. dec. of 1860, p. 201, Norton L. C. 5; *Authikesavulu Chetty* v. *Ramanajam Chetty* (1909), 32 Mad. 512.

[2] *Ante*, p. 54.

[3] Even where the marriage is with a divorced woman who is entitled by custom to remarry; *Hira* v. *Hansji Pema* (1912), 37 Bom. 295; 14 Bom. L. R. 1182.

[4] Act XLV. of 1860.

[5] *Empress* v. *Pitambur Singh* (1879), 5 Calc. 566; 5 C. L. R. 597.

[6] See *Danesh Sheikh* v. *Tafir Mandal* (1902), 7 C. W. N. 143.

[7] Act I. of 1872 (Evidence), s. 50.

[8] *Kudomee Dossee* v. *Joteeram Kolita* (1877), 3 Calc. 305; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 236; "Manu," chap. ix. paras. 46, 101.

[9] See *Kudomee Dossee* v. *Joteeram Kolita* (1877), 3 Calc. 305; *Reg.* v. *Sambhu Raghu* (1876), 1 Bom. 347; *Reg.* v. *Karsan Goja* (1864), 2 Bom. H. C. 124; *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97, at p. 114; *Dyaram Doolubh* v. *Umba (Baee)* (1843), Morley's "Digest," vol. i., N. S., p. 181; *Kasee Dhoolubh* v. *Ruttun Bibee* (1817), 1 Borr. 410.

[10] See *Keshav Hargovan* v. *Gandi (Bai)* (1915), 39 Bom. 538; 17 Bom. L. R. 584.

[11] *Sankaralingam Chetti* v. *S*[illegible] *Chetti* (1894), 17 Mad. 479. [illegible] was a case of members of the [illegible] caste in Tinnevelly.

[12] See *Reg.* v. *Sambhu Ragh*[illegible] 1 Bom. 347; *Uji* v. *Hat*[illegible] 7 Bom. H. C. A. C. 13[illegible]

castes a divorce is generally not effectual, except with the authority of the *panchayet*.[1]

It is incompetent to Hindus at the time of their marriage to arrange that the marriage be void in certain events,[2] whether divorce be or be not permissible in the particular caste.

Except under the circumstances provided for in Act XXI. of 1866, the Courts have no power to decree a divorce.[3]

Adultery.

A dissolution of marriage is not effected by the adultery [4] of the husband or wife.

Remedy of wife.

The only remedy which a blameless wife has against an offending husband is to obtain a decree for her separate maintenance,[5] such decree being practically equivalent to a decree for judicial separation.[6]

Indian Divorce Act.

The Indian Divorce Act [7] applies to a Hindu marriage contracted before the conversion of the parties to Christianity.[8]

Change of religion.

The change of religion [9] or the excommunication from caste [10] of either party does not effect a divorce.

Divorce at instance of convert to Christianity.

Where a Hindu husband or wife is deserted or repudiated on the ground of his or her conversion to Christianity, a decree for divorce can, under the provisions of the Native Converts Marriage Dissolution Act (XXI. of 1866),[11] be made in favour of the person so deserted or repudiated, and the parties can marry again as if the prior marriage had been dissolved by death.[12]

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[1] See *Rahi* v. *Govind Valad Teja* (1875), 1 Bom. 97, at p. 114.

[2] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[3] The Courts seem formerly to have granted divorces. See *Kaseeram Kriparam* v. *Umbaram Hureechund* (1811), 1 Borr. 387.

[4] *Subbaraya Pillai* v. *Ramasami Pillai* (1899), 23 Mad. 171, at pp. 177, 178.

[5] *Post*, p. 94.

[6] See *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377, at p. 379.

[7] IV. of 1869.

[8] Indian Divorce (Amendment) Act, 1912 (X. of 1912), s. 2. Before the ...ing of that Act the Courts enter-...d different views on the subject, ...*bardhan Dass* v. *Jasadamoni* (1891), 18 Calc. 252; *Thapita* ... *Thapita Lakshmi* (1894), 17 ...5; *Perianayakam* v. *Pottu-* ...890), 14 Mad. 382; *Magania* ...907), 8 Bom. L. R. 856; *Zuburdust Khan* (1870), 2 N. W. P. 370.

[9] *Government of Bombay* v. *Ganga* (1880), 4 Bom. 330; *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466; *Perianayakam* v. *Pottukanni* (1890), 14 Mad. 382, at p. 384; *Thapita Peter* v. *Thapita Lakshmi* (1894), 17 Mad. 235, at p. 239; *In re Millard* (1887), 10 Mad. 218; *In the matter of Ram Kumari* (1891), 18 Calc. 264; *Gobardhan Dass* v. *Jasadamoni Dassi* (1891), 18 Calc. 252, at pp. 254, 255; *contrâ Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169; *Rahmed Bibee* v. *Rokeya Bibee* (1859), 1 Norton's L. C. 12.

[10] See *Queen* v. *Marimuttu* (1881), 4 Mad. 243; *Administrator-General of Madras* v. *Anandachari* (1886), 9 Mad. 466; *Bisheshur* v. *Mata Gholam* (1870), 2 N. W. P. 300; *contrâ Sinammal* v. *Administrator-General of Madras* (1885), 8 Mad. 169.

[11] See the procedure provided by that Act.

[12] S. 19 of the Act.

CHAPTER II.

HUSBAND AND WIFE (*continued*).

RECIPROCAL RIGHTS AND DUTIES.

THE parties to a marriage cannot by arrangement or otherwise vary the rights, duties, and other incidents which the law attaches to the marriage state.

Agreement varying rights, etc.

An ante-nuptial agreement, by which the husband undertakes never to remove his wife from the parental abode, is not binding on him.[1] Similarly, no effect can be given to an agreement which provides that, on the husband taking another wife, the first marriage should be void.[2]

RIGHTS TO SOCIETY AND GUARDIANSHIP.

A husband is entitled to the society of his wife.[3] He can require her to live with him wherever he may choose to reside,[4] and to submit herself obediently to his authority.[5]

Rights of husband.

Effect cannot be given to an arrangement between husband and wife that they should separate, and that neither of them shall sue for restitution of conjugal rights, unless the agreement indicates a state of circumstances which would be an answer to a suit for restitution of conjugal rights.[6]

Post-nuptial arrangement for separation.

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[1] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751; 5 C. W. N. 673; *Paigi* v. *Sheonarain* (1885), 8 All. 78, at pp. 79, 80.

[2] *Sitaram* v. *Aheeree Heerahnee* (*Mussamut*) (1873), 11 B. L. R. 129; 20 W. R. C. R. 49.

[3] *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298, at p. 300; 23 W. R. C. R. 179.

[4] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 760; 5 C. W. N. 673, at p. 680. See *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at pp. 90, 91; *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377.

[5] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 760; 5 C. W. N. 673, at p. 680; *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377, at p. 379.

[6] *Rajlukhy Dabee* (*Sm.*) v. *Bhootnath Mookerjee* (1900), 4 C. W. N. 488. See *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 765; 5 C. W. N. 673, at pp. 683, 684; *Moola* v. *Nundy* (1872), 4 N. W. P. p. 109.

An arrangement for a separation to commence at a future date is contrary to public policy.[1]

Guardianship of minor wife.

A husband, even if he has not attained the age of majority,[2] is the lawful guardian of the person of his minor [3] wife,[4] in preference to her parents or other relations, unless, according to the custom of the caste or community to which he belongs, he be precluded from such custody until the wife be fit for marital intercourse.[5]

It is the practice among the Hindu community in the Madras Presidency for a wife to be left with her parents until she attains puberty. The husband is only entitled to the custody of her person when such custody is necessary in her interests.[6]

Guardianship of minor widow.

After the husband's death the guardianship of his minor widow, and the management of her property, devolve upon the husband's heirs generally, or upon those who are entitled to inherit his estate after her death,[7] in preference even to her own father.[8] On failure of her husband's heirs the widow's paternal relations are her guardians, and failing them, her maternal kindred.[9]

Restraint of wife.

Having regard to the custom of the country that women, at any rate in the higher positions of life, are secluded in the *zenana*, a Hindu husband would apparently be entitled to exercise, within reasonable limits, a certain amount of

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[1] *Krishna Aiyar* v. *Balammal* (1910), 34 Mad. 398; *Merryweather* v. *Jones* (1863), 4 Giff. 590; 10 Jur. N. S. 90; 10 L. T. 62; referred to in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at p. 765; 5 C. W. N. 673, at p. 684.

[2] Act VIII. of 1890, s. 21.

[3] *I.e.* minor within the meaning of the Indian Majority Act (IX. of 1875).

[4] Guardians and Wards Act (VIII. of 1890), ss. 19, 41 (*d*). *In the matter of Dhuronidhur Ghose* (1889), 17 Calc. 298; *Kateeram Dokanee* v. *Gendhenee* (*Mussamut*) (1875), 23 W. R. C. R. 178. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 45; 5 C. W. N. 195, at p. 201.

[5] *Suntosh Ram Doss* v. *Gera Pattuck* (1875), 23 W. R. C. R. 22; *Bool Chand Kalta* v. *Janokee* (*Mussamut*) (1875), 24 W. R. C. R. 228; S. C. (1876), 25 W. R. C. R. 386.

[6] *Arumuga Mudali* v. *Viraraghava Mudali* (1900), 24 Mad. 255.

[7] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 104; vol. ii. chap. vii., cases 1, 3. *Kheter Monee Dassee* v. *Kishen Mohun Mitter* (1863), 2 Hay, 196; Marshall, 313; *Khudiram Mookerjee* v. *Bonwarilal Roy* (1889), 16 Calc. 584; *Kesar* (*Bai*) v. *Ganga* (*Bai*) (1872), 8 Bom. H. C. R., A. C. J. 31; see West and Bühler, 2nd ed., pp. 129, 134, 245, and 556; "Dayabhaga," chap. xi., s. 1, para. 64.

[8] Macnaghten's "Hindu Law," ed. 1829, vol. ii. chap. vii. case 3, p. 204.

[9] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 104.

restraint upon his wife, even if she be an adult, so as to keep her at home.[1]

"The Hindu law, while it enjoins upon the wife the duty of attendance on, obedience to, and veneration for, the husband, inculcates that the husband must honour the wife and treat her with affection and courtesy."[2]

Duty of husband to wife.

In spite of early texts, which give a husband power to correct his wife,[3] it is clear that he is no way justified in chastising or assaulting her. The Indian Penal Code[4] does not exempt a husband from liability for an offence committed against his wife's person, except that it provides[5] that sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape.

Assault on wife.

A wife is entitled to live with[6] and to be maintained by[7] her husband in his house.

Right of wife to society of husband.

The mere fact that she has been excluded from caste does not make the wife a trespasser when coming to her husband's house.[8] If she has been expelled from his house for proper cause, she might be treated as a trespasser on returning without his leave.

The right of a husband to the society of his wife, and that of a wife to the society of her husband, may be enforced against the other party to the marriage[9] by a suit for restitution of conjugal rights.[10]

Enforcement of right to society.

A suit for the purpose of obtaining possession of the person of a wife

Suit for possession of person of wife.

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[1] See *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at pp. 90, 91.

[2] *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84, at p. 90.

[3] "Manu," chap. viii. paras. 299, 300.

[4] Act XLV. of 1860.

[5] S. 375. See *Queen-Empress* v. *Hurree Mohun Mythee* (1890), 18 Calc. 49.

[6] See *Binda* v. *Kaunsilia* (1890), 13 All. 126, at pp. 132, 133; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298, at p. 300; 23 W. R. C. R. 179.

[7] See *post*, pp. 76, 77.

[8] *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

[9] As to the remedy against a third person for detaining a wife, see *post*, p. 74.

[10] *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751; 5 C. W. N. 673; *Surjya Moni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 45; 5 C. W. N. 195, at p. 201; *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301; *Keshavlal Girdharlal* v. *Bai Parvati* (1893), 18 Bom. 327; *Binda* v. *Kaunsilia* (1890), 13 All. 126; *Paigi* v. *Sheonarain* (1885), 8 All. 78; *Jogendronundini Dossee* v. *Hurrydoss Ghose* (1879), 5 Calc. 500; 5 C. L. R. 65; *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee* (1875), 14 B. L. R. 298; 23 W. R. C. R. 179; *Kuroona Moyee Debee* v. *Gunga Dhur Surmah* (1873), 20 W. R. C. R. 50; *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105; *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552. See *Buzloor Ruheem (Moonshee)* v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at pp. 606–610; 8 W. R. P. C. 3, at pp. 12, 13.

will not lie against the wife ;[1] but such suit might be treated as in substance one for restitution of conjugal rights.[2]

Grounds for refusing decree.

The circumstances which justify desertion are an answer to a suit for the restitution of conjugal rights.[3]

Defence to suit for restitution.

In *Dadaji Bhikaji* v. *Rukmabai* [4] the Court said, " It may be advisable that the law should adopt stringent measures to compel the performance of conjugal duties ; but, as long as the law remains as it is, Civil Courts, in our opinion, cannot, with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances), recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*." [5]

The circumstances which justify desertion are—

Cruelty.

1. Cruelty, whether physical or moral, in a degree rendering it unsafe for the wife to return to the power of her husband, or reasonable apprehension of such cruelty.[6]

Cruelty to a less degree,[7] as, for instance, an unfounded imputation upon the wife's chastity,[8] or taking her jewels from her,[9] or mere unkindness or neglect [10] short of cruelty, would not seem to be an answer to a

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[1] *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105, followed in *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552.

[2] See *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 309.

[3] See *Binda* v. *Kaunsilia* (1890), 14 All. 126, at p. 163.

[4] (1886), 10 Bom. 301, at p. 313. See *Sahadur* v. *Rajwanta* (1904), 27 All. 96, following *Binda* v. *Kaunsilia* (1890), 13 All. 126.

[5] (1864), 34 L. J. P. & M. 23; cf. Act IV. of 1869, s. 33. See, however, *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, at p. 236. It is submitted that this application of a principle of English law leads to difficulties, as a suit for judicial separation is inapplicable to Hindus. The matter must be dealt with by Hindu law (*ante*, pp. 3–5). See *Buzloor Ruheem* (*Moonshee*) v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at p. 614; 8 W. R. P. C. 3, at p. 15.

[6] *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510; *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173; *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84; *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 184; *Sitabai* v. *Ramchandrarao* (1910), 12 Bom. L. R. 373. Cf. *Buzloor Ruheem* (*Moonshee*) v. *Shumsoonissa Begum* (1867), 11 M. I. A. 551, at p. 615; 8 W. R. P. C. 3, at p. 15.

[7] See *Jogendronundini Dossee* v. *Hurrydoss Ghose* (1879), 5 Calc. 500, at pp. 502, 507, 508; 5 C. L. R. 65, at pp. 71, 72.

[8] *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

[9] *Jeebo Dhon Banyah* v. *Sundhoo* (*Mussamut*) (1872), 17 W. R. C. R. 522.

[10] See *Sitanath Mookerjee* v. *Haimabutty Dabee* (1875), 24 W. R. C. R. 377, at p. 379. As to the ideas of the early Hindu law with regard to the power to correct a wife, see Strange's "Hindu Law," vol. i. pp. 48, 49, referred to in *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

suit for restitution. In a case where a husband, a Brahmin, having expelled his wife, was living in his house with a low-caste prostitute, he was refused restitution.[1]

Cruelty of wife.

There seem to be no reported decisions in India on the subject, and it is unlikely that any cases would occur, but there seems to be no reason why cruelty by the wife should not be an answer to a suit by her for restitution of conjugal rights.

Loathsome disease.

2. The fact that the person suing for restitution of conjugal rights is suffering from a loathsome disease.[2]

Communication of disease.

Thus a decree was refused to a husband suffering from leprosy and syphilis.[3] It would follow that the communication of a noxious disease would justify a wife in declining to consort with her husband.[4]

If the principle laid down in *Dadaji Bhikaji* v. *Rukmabai* [5] be correct, diseases, which are not the result of marital offences, would be excluded from consideration.

Adultery of wife.

3. Adultery by the wife [6] in a suit by the wife.[7]

As to adultery by a husband, see *post*, p. 71.

Loss of caste.

It is unsettled whether mere loss of caste is an answer to a suit for restitution of conjugal rights.

Under the ancient law a wife could not be compelled to live with an outcast husband.[8] The High Courts at Agra [9] and Allahabad [10] have declined to accept loss of caste as an excuse for refusal to cohabit, but in another Allahabad case [11] the High Court made return to caste a condition precedent to a decree. The right to the society of the wife would, it is submitted, be a right within the meaning of Act XXI. of 1850,[12] but the Court would, it is also submitted, have to inquire into the reasons for the degradation, in order to satisfy itself that a decree would not inflict unnecessary hardship upon the wife. Where the loss of caste is

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[1] *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510. See *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 239; 9 C. W. N. 270, at p. 274.

[2] See Colebrooke's "Digest," vol. ii. pp. 414, 490.

[3] *Premkuvar* (*Bai*) v. *Bhika Kallianji* (1868), 5 Bom. H. C., A. C. J. 209. Devala considered phthisis as a disease justifying desertion of a husband. Colebrooke's "Digest," vol. ii. p. 470.

[4] See *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at p. 173.

[5] *Ante*, p. 68.

[6] Colebrooke's "Digest," vol. ii. p. 415.

[7] As to a suit by the husband, see *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 47; 5 C. W. N. 195, at p. 203.

[8] Colebrooke's "Digest," vol. ii. p. 413.

[9] *Emurtee* (*Mussamut*) v. *Nirmul*, N. W. P. Reps., 1864, p. 583.

[10] *Sahadur* v. *Rajwanta* (1904), 27 All. 96.

[11] *Paigi* v. *Sheonarain* (1885), 8 All. 78. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at pp. 47, 48; 5 C. W. N. 195, at p. 203.

[12] Cf. *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235.

capable of expiation the course adopted in the above case was, it is submitted, correct.[1] Where the loss is such as to involve no moral turpitude, the Court would not treat it as an excuse for desertion.

It is not easy to say, in the present state of Hindu society, what offences justify a degradation from caste.[2]

Change of religion.

It is also unsettled whether the adoption of another religion by the person seeking restitution is an answer to the suit. It would apparently be an answer in most cases.[3]

The matter stands to some extent on the same footing as the case of degradation from caste. It would undoubtedly have been under the ancient law a ground for desertion. In the case of a conversion to Christianity the procedure provided by Act XXI. of 1866 [4] would by implication prevent a Court from forcing cohabitation upon a party refusing it on the ground of the conversion of the person seeking it to Christianity. In the case of a conversion to Mahomedanism it would be impossible to enforce cohabitation. The mere abandonment of Hinduism without any formal exclusion from caste would scarcely be an answer. A return to Hinduism after performance of the prescribed expiation would dispose of an objection to cohabitation on the ground of conversion.

As to the effect of a change of religion upon the marriage tie, see *ante*, p. 64.

Condonation.

Conduct which has been condoned is no answer to a suit for restitution, unless it has been revived by subsequent misconduct.[5]

A decree for restitution of conjugal rights cannot be refused on any of the following grounds :—

Non-consummation.

1. The fact that the marriage has not been consummated.[6]

Minority.

2. Minority.

The minority of the husband can be no answer to a suit by him, as he is ordinarily entitled to be the guardian of his wife's person,[7] and it can scarcely be an answer to a suit against him. The minority of the wife would be no answer to a suit by the husband, except under circumstances

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[1] Cf. *Jina (Bai)* v. *Kharwar Jina* (1907), 31 Bom. 366; 9 Bom. L. R. 451.

[2] See Banerjee's "Law of Marriage," 3rd ed., pp. 195, 196.

[3] See *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, at p. 236. See, however, *In re the wife of P. Streenevassa*, 1 Norton L. C. 13, where the Court ordered the wife of a converted Brahmin to be restored to him on a writ of *habeas corpus*. If the rule adopted in *Dadaji Bhikaji* v. *Rukmabai* (*ante*, p. 68) be correct, change of religion would be no answer.

[4] Ss. 16–18.

[5] See *Jogendronundini Dossee* v. *Hurry Doss Ghose* (1879), 5 Calc. 500; 5 C. L. R. 65.

[6] *Dadaji Bhikaji* v. *Rukmabai* (1886), 10 Bom. 301, at pp. 310, 311.

[7] *Ante*, p. 66.

which would disentitle him to act as guardian of her person,[1] but it might in some cases be proper to put him upon terms; for instance, that she should be placed by him in charge of a female member of his family.[2] The minority of the wife could be no answer to a suit by her.

Insanity.

3. The unsoundness of mind of the plaintiff, whether it commenced before or after the marriage.[3] The Court would not, however, make a decree, obedience to which might be a danger to the defendant.

Sir William Macnaghten [4] considered that the insanity of the husband justified his wife in deserting him. He relies on a text of *Manu*,[5] which has been otherwise interpreted.[6] There is a text to the effect that the insanity of the wife is a ground for excluding her from the husband's bed, and from pilgrimage, but from nothing else.[7]

Mental weakness.

Mental infirmity short of insanity can clearly be no answer to a suit for restitution.[8]

Second marriage.

4. A second marriage by the husband.[9]

Adultery.

5. Adultery by the husband.[10]

Where the husband is actually living in adultery,[11] or his conduct has been such as to prevent his wife from returning to him without loss of caste (see *ante*, pp. 69, 70) or injury to her self-respect and religious feeling,[12] the Court might refuse a decree.

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[1] *Ante*, pp. 66, 68, 69.

[2] *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37; 5 C. W. N. 195; *Kateeram Dokanee* v. *Gendhenee* (*Mussamut*) (1875), 23 W. R. C. R. 178.

[3] See *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 155; Sircar's "Vyavastha Chandrika," vol. ii. p. 489, note. Cf. Indian Divorce Act (IV. of 1869), s. 33; *Hayward* v. *Hayward* (1858), 1 Sw. & Tr. 81.

[4] "Hindu Law," vol. ii. p. 62. As insanity at the time of marriage does not invalidate the marriage (*ante*, pp. 34, 35), it could not be an answer to a suit for restitution.

[5] "Manu," chap. ix. para. 79.

[6] Gloss of *Culluka*, Colebrooke's "Digest," vol. ii. p. 412; Sircar's "Vyavastha Chandrika," vol. ii. p. 489, note.

[7] Text of *Devala*, Colebrooke's "Digest," vol. ii. p. 414.

[8] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 161.

[9] *Arumugam* v. *Tulukanam* (1883), 7 Mad. 187; *Nathubai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121, at p. 122; *Jeebo Dhon Banyah* v. *Sundhoo* (*Mussamut*) (1872), 17 W. R. C. R. 522; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375; see *ante*, p. 36.

[10] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at p. 164; *Paigi* v. *Sheonarain* (1885), 8 All. 78, at p. 81; *Gantapalli Appalamma* v. *Gantapalli Yellayya* (1897), 20 Mad. 470; Macnaghten's "Hindu Law," i. 61, 62. See Strange's "Hindu Law," ii. 46, 47.

[11] *Paigi* v. *Sheonarain* (1885), 8 All. 78, at p. 81. See *Dular Koer* v. *Dwarkanath Misser* (1905), 34 Calc. 971; 9 C. W. N. 510, *ante*, p. 69; and *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 239; 9 C. W. N. 270, at p. 274. See, however, case No. 457 of 1884, 20 Mad. 474, note.

[12] See *Gabind Prasad* (*Lala*) v. *Doulat Batti* (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451.

Impotence.

It is submitted that the impotence of the plaintiff[1] originating after marriage is no answer to a suit for restitution.

Whether it is an answer when it was existing at the time of the marriage would, it is submitted, depend upon whether the Court would set aside the marriage on that account.[2] *Manu*[3] makes no distinction between impotence arising after and impotence arising before marriage, but the text by which he is said to permit a wife to abandon an impotent husband has been differently interpreted.[4]

Where order would be unjust.

Where it would be manifestly unjust to order restitution of conjugal rights, the Court can refuse to make such order.

For instance, in *Moola* v. *Nundy*,[5] where, in consequence of the misconduct of the husband, a *panchayet* had adjudged a separation, and the parties had lived apart for thirteen years, the Court declined to make an order.

When right of suit arises.

A right of suit for restitution of conjugal rights arises on a refusal, express or implied, to return to cohabitation.[6]

A formal demand, and refusal, to return to cohabitation is not a condition precedent to such suit,[7] but there must be a willingness on the part of the plaintiff to resume cohabitation.

The suit must be brought within six years from the time when the right to sue accrues.[8]

Repetition of refusal.

A second suit for restitution based upon the continued disobedience to the decree in the first suit would apparently be barred by the law of *res judicata*,[9] but a second withdrawal from cohabitation would give a fresh cause of action.[10]

Form of decree.

The decree should declare that the plaintiff is entitled to the restitution of conjugal rights, and that the defendant (if the wife) be directed to go to her husband's house.[11] If the

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[1] The impotence of the defendant is no answer, see *Purshotamdas Maneklal* v. *Mani* (*Bai*) (1896), 21 Bom. 610. Devala permitted a wife to desert her impotent husband. Colebrooke's "Digest," vol. ii. p. 470.

[2] See *ante*, p. 35.

[3] Chap. ix. para. 79.

[4] See Colebrooke's "Digest," vol. ii. p. 412 ; Sircar's "Vyavastha Chandrika," vol. ii. 489, note.

[5] (1872), 4 N. W. P. H. C. 109.

[6] Cf. *Dhanjibhoy Bomanji* v. *Hirabai* (1901), 25 Bom. 644; 3 Bom. L. R. 371.

[7] *Binda* v. *Kaunsilia* (1890), 13 All. 126, at pp. 139 *et seq.* See *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307, at p. 310. For the purpose of jurisdiction the cause of action is considered to arise at the husband's house. *Lalitagar Keshargar* v. *Suraj* (*Bai*) (1893), 18 Bom. 316.

[8] Limitation Act (IX. of 1908), sch. 1, art. 120. See *Krishna Aiyar* v. *Balammal* (1910), 34 Mad. 398.

[9] The Court declined to decide this question in *Keshavlal Girdharlal* v. *Parvati* (*Bai*) (1893), 18 Bom. 327, at pp. 329, 331.

[10] *Keshavlal Girdharlal* v. *Parvati* (*Bai*) (1893), 18 Bom. 327.

[11] *Furzund Hossein* v. *Janu Bibee* (1878), 4 Calc. 588, at p. 591 ; *Fakirgauda* v. *Gangi* (1898), 23 Bom. 307,

defendant be the husband the decree should direct him to restore such rights to his wife.

Conditional decree.

The Court may make a decree for restitution of conjugal rights upon conditions to be fulfilled by the plaintiff. In one case[1] the decree was made subject to the husband being restored to caste. In another case[2] the Court required "that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife." The Court might also require proper security to be taken for the protection of the wife.[3]

Execution of decree.

When the party, against whom a decree for restitution of conjugal rights has been made, has had an opportunity of obeying it, and has wilfully failed to obey it, the decree may be enforced by his or her imprisonment,[4] or by the attachment of his or her property, or by both.

When the attachment has remained in force for one year, if the decree has not been obeyed, and the decree-holder has applied to have the attached property sold, the property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance (if any) to the judgment debtor on his or her application. Where the judgment debtor has obeyed the decree, and paid all costs of executing the same, which he or she is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made or granted, the attachment should cease. The Court can refuse execution against the person, and may order periodical payments to the wife.[5]

Summary remedies.

Where the wife is within the Presidency towns of Calcutta, Madras, and Bombay, the right of the husband to the custody of his minor wife may be enforced by an order of the nature of a *habeas corpus*.[6]

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at p. 309; *Chotun Bebee* v. *Ameer Chund* (1866), 6 W. R. C. R. 105, followed in *Koobur Khansama* v. *Jan Khansama* (1867), 8 W. R. C. R. 467. Cf. Form 19 of schedule to Act IV. of 1869.

[1] *Paigi* v. *Sheonarain* (1885), 8 All. 78. In *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at pp. 47, 48; 5 C. W. N. 195, at p. 203, a husband was required to get his wife restored to caste as a condition of obtaining a decree against her for restitution.

[2] *Jogendronundini Dossee* v. *Hurry Doss Ghose* (1879), 5 Calc. 500, at p. 508; 5 C. L. R. 65, at pp. 72, 73. See *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1901), 28 Calc. 751, at pp. 755, 766; 5 C. W. N. 673, at pp. 677, 684.

[3] *Buzloor Ruheem* (*Moonshee*) v. *Shumsoonnissa Begum* (1867), 11 M. I. A. 551, at p. 617; 8 W. R. P. C. 3, at p. 16.

[4] Six weeks is the limit of imprisonment; Civil Procedure Code (Act V. of 1908), s. 58.

[5] Civil Procedure Code (Act V. of 1908), Sched. I., ord. xxi., rules 32, 33.

[6] Criminal Procedure Code (Act V. of 1898), s. 491.

There is also, throughout India, a summary remedy by a magistrate's order.[1]

Guardians and Wards Act.

Where the husband has already had the custody of his minor wife, and she has left, or is removed from, his custody, there is also a remedy under sec. 25 of the Guardians and Wards Act.[2]

Damages.

The husband is also entitled to recover damages from the person harbouring his wife or enticing her away,[3] whether or not for improper purposes, and to obtain an injunction against such person from interfering with his wife rejoining him.

"Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him." [4]

A suit for damages against a person committing adultery with a wife would also apparently lie.[5]

It is not possible to lay down any exact rule as to the measure of damages in these cases. The principles adopted in English cases might, to some extent, be applied. On the one hand, the Court should consider the loss of the wife's society, affection, services and assistance in domestic affairs, and the social injury (if any) which the husband is likely to suffer from the act complained of. On the other hand, the behaviour of the husband towards his wife may be taken into account. The capacity of the defendant to pay damages is not generally (if ever) a circumstance for consideration.[6]

Rights over Property.

Power of wife over her property.

Except that in times of pressing need he may use his wife's separate property,[7] and that he has in certain cases a right of

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[1] Criminal Procedure Code (Act V. of 1898), ss. 100, 552.

[2] VIII. of 1890.

[3] See *Hurka Shunkur* v. *Raeejee Munohur* (1908), 1 Borr. 353.

[4] *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at pp. 174, 175. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 43; 5 C. W. N. 195, at p. 200; *Lall Nath Misser* v. *Sheoburn Pandey* (1873), 20 W. R. C. R. 92.

[5] *Soodasun Sain* v. *Lokenauth Mullick* (1859), Montriou's cases of Hindu law, p. 619. Strange's "Hindu Law," vol. i. p. 46, vol. ii. p. 41. See *contrâ*, Macnaghten's "Hindu Law," vol. i. p. 61, and opinions of Colebrooke and Ellis, Strange's "Hindu Law," vol. ii. pp. 40–44.

[6] See *Kelly* v. *Kelly* (1869), 3 B. L. R. O. C. 67.

[7] See *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184; *Tukaram* v. *Gunaji* (1871), 8 Bom. H. C. A. C. 129; "Mitakshara," chap. ii. s. 11, paras. 32, 33; "Dayabhaga," chap. iv. s. 1, paras. 19–25;

inheritance, a husband does not by marriage acquire any beneficial interest in his wife's property.[1]

As to his power to control her disposal of property acquired by her in certain ways, see *post*, pp. 443, 444.

Contract by married woman.

A Hindu married woman is competent to contract,[2] but unless she be an agent, either express or implied, of her husband, she does not thereby bind him or his property.[3] Her own property is liable for her debts.[4]

A woman is exempt from imprisonment in execution of a money decree.[5]

Necessaries.

Where the wife is living with her husband, or is living apart from him under such circumstances [6] as would justify an order for separate maintenance, the Court would presume an authority to bind the husband for necessaries,[7] but such presumption can be rebutted by evidence that the authority has been revoked.

Suit by or against married women.

A Hindu married woman can sue or be sued in her own name.[8]

There is no presumption of law that transactions which stand in the name of the wife are the husband's transactions,[9] although it may frequently happen that a husband buys property in his wife's name.

"Vivada Chintamoni" (Tagore's translation), pp. 264–265; "Vyavahara Mayukha," chap. iv. s. 10, paras. 7–10; "Smriti Chandrika," chap. ix. s. 2, para. 14.

[1] *Sooda Ram Doss* v. *Joogul Kishore Goopto* (1875), 24 W. R. C. R. 274; *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184. See *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi* (1867), 3 Mad. H. C. 272, at pp. 278, 279; *Reg.* v. *Natha Kalyan* (1871), 8 Bom. H. C. Cr. C. 11.

[2] Indian Contract Act (IX. of 1872), s. 11. The Hindu law permitted her to contract, see *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121, at p. 123; Strange's "Hindu Law," vol. i. p. 276.

[3] *Pusi* v. *Mahadeo Prasad* (1880), 3 All. 122.

[4] *Nahalchand* v. *Bai Sheva* (1882), Bom. 470; *Oodey Singh* (*Kooer*) v. *Phool Chund* (1873), 5 N. W. P. 197. See *Nathubhai Bhailal* v. *Javher Raiji* (1876), 1 Bom. 121; *Govindji Khimji* v. *Lakmidas Nathubhoy* (1879), 4 Bom. 318; *Narotam* v. *Nanka* (1882), 6 Bom. 473; *In re the petition of Radhi* (1887), 12 Bom. 229.

[5] Civil Procedure Code (Act V. of 1908), s. 56.

[6] *Ante*, pp. 68–70.

[7] *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375, at p. 379; *Pusi* v. *Mahadeo Prasad* (1880), 3 All. 122; *Nathubhai Bhailal* v. *Javher Raiji* (1871), 1 Bom. 121, at p. 123; Contract Act (IX. of 1872), s. 187.

[8] *Bhoyrubchunder Dass* v. *Madhubchunder Paramanic* (1863), 1 Hyde, 281.

[9] *Manada Sundari Dabi* v. *Mahananda Sarnakar* (1897), 2 C. W. N. 367. See *Ran Bijai Bahadur Singh* (*Diwan*) v. *Indarpal Singh* (1899), 26 I. A. 227; 26 Calc. 871; 4 C. W. N. 1; *Chowdrani* v. *Tariny Kanth Lahiry* (1882), 8 Calc. 545; 11 C. L. R. 41 (on appeal this question did not arise, *Dharani Kant Lahiri Chowdhry* v. *Kristo Kumari Chowdhrani* (1886), 13 I. A. 70; 13 Calc. 181); *Narayana* v. *Krishna* (1884), 8 Mad. 214; *contrâ*, *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (1866), 6 W. R. C. R. 312.

estate,[1] she has no right to be maintained by her own or by her husband's relations,[2] unless they have property belonging to her husband in their hands.[3]

Except where she has been guilty of infidelity,[4] a husband may be required to maintain his wife, even though she cannot compel him to restore her to other conjugal rights.[5]

Although under the Hindu law the right of a wife to be maintained by her husband does not depend upon the possession of any property by him,[6] a wife would gain nothing by a suit against a penniless husband, and could only force him to maintain her by the fruits of his labour by a proceeding under the Criminal Procedure Code.[7]

As to the right of a wife to pledge her husband's credit for necessaries, see *ante*, p. 75.

Although the husband may abandon Hinduism, he cannot thereby destroy his wife's right of maintenance.[8] Abandonment of Hinduism

The Court can award maintenance to a wife whose marriage has been dissolved under the provisions of the "Native Converts' Marriage Dissolution Act, 1866."[9] Dissolution of marriage

Where the husband is excluded from inheritance on the ground of some disqualification,[10] his wife is, if chaste, entitled to maintenance out of the property to which he would have succeeded if he had not been so disqualified.[11] If her sons succeed to the inheritance she has the right of a mother.[12] Husband disqualified from inheritance

A wife would ordinarily be entitled to maintenance in her husband's house,[13] but when he, without excuse,[14] refuses to allow her to reside with him,[15] or when she is justified in Place of maintenance

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[1] *Post*, pp. 210, 211.

[2] *Iyagaru Soobaroyadoo* v. *Iyagaru Sashama*, Mad. S. R. 1856, p. 22; *Rangayyan* v. *Kalyani Ummall*, Mad. S. R. 1860, p. 86, cited in 1 Norton L. C. p. 39.

[3] *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283. See *post*, p. 79.

[4] *Post*, p. 78.

[5] See "Manu," chap. xi. para. 189.

[6] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 103. See *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 48.

[7] *Post*, p. 98.

[8] See (1868), 4 Mad. H. C. App. iii.

[9] Act XXI. of 1866, s. 28.

[10] *Post*, pp. 370–373.

[11] "Mitakshara," chap. ii. s. 10, paras. 14, 15; "Dayabhaga," chap. v. para. 19; "Vyavahara Mayukha," chap. iv. s. 17, para. 12; Tagore's "Vivada Chintamani," p. 244; "Smriti Chandrika," chap. v. para. 43.

[12] See *post*, p. 79.

[13] *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375.

[14] *Ante*, pp. 68–70.

[15] *Nitye Luha* v. *Soondaree Dossee* (1868), 9 W. R. C. R. 475. See *Sidlingapa* v. *Sidava* (1878), 2 Bom. 634; *Rampriya* v. *Bhriguram* (1815), 2 Wm. Macn. 109.

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Abandonment of Hinduism.

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Dissolution of marriage.

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Husband disqualified from inheritance.

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Place of maintenance.

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1 *Post*, pp. 210, 211.

2 *Iyagaru Soobaroyadoo* v. *Iyagaru Sashama*, Mad. S. R. 1856, p. 22; *Rangayian* v. *Kalyam Ummall*, Mad. S. R. 1860, p. 86, cited in 1 Norton L. C. p. 39.

3 *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283. See *post*, p. 79.

4 *Post*, p. 78.

5 See "Manu," chap. xi. para. 189.

6 *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 103. See *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 48.

7 *Post*, p. 98.

8 See (1868), 4 Mad. H. C. App. iii.

9 Act XXI. of 1866, s. 28.

10 *Post*, pp. 370–373.

11 "Mitakshara," chap. ii. s. 10, paras. 14, 15; "Dayabhaga," chap. v. para. 19; "Vyavahara Mayukha," chap. iv. s. 17, para. 12; Tagore's "Vivada Chintamani," p. 244; "Smriti Chandrika," chap. v. para. 43.

12 See *post*, p. 79.

13 *Sitanath Mookerjee* v. *Haimabutty Dabee* (*Sreemutty*) (1875), 24 W. R. C. R. 377; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375.

14 *Ante*, pp. 68–70.

15 *Nitye Laha* v. *Soondaree Dossee* (1868), 9 W. R. C. R. 475. See *Sidlingapa* v. *Sidava* (1878), 2 Bom. 634; *Rampriya* v. *Bhriguram* (1815), 2 Wm. Macn. 109.

residing apart from him,[1] she is entitled to separate maintenance.[2]

Except where there is such refusal or justification, a wife cannot enforce an arrangement for separate maintenance.[3]

Release of right.

A wife cannot release her right of maintenance, but an arrangement fixing the amount of her maintenance will, if fair, be upheld.[4]

The right of a Hindu female to maintenance is one peculiarly needing protection.[5]

Loss of right.

A wife who without just cause deserts her husband,[6] or refuses to live with him,[7] or is unchaste,[8] loses her right of maintenance.

An unchaste wife loses her right of maintenance, even if it has been secured by a decree,[9] or by an agreement.[10]

As to right of an unchaste wife to what is called "starving maintenance," see *post*, p. 83.

A wife does not lose the right by a mere loss of caste.[11]

Maintenance of widow.

A widow who succeeds to no property as heir to her husband, is (whether she has or has not a son) [12] entitled to maintenance

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[1] *Sitabai* v. *Ramchandrarao* (1910), 12 Bom. L. R. 373. See *Gabind Pershad* (*Lalla*) v. *Doulat Batti* (1870), 6 B. L. R. App. 85; 14 W. R. C. R. 451. As to the circumstances which justify her in declining to live with her husband, see *ante*, pp. 68–70.

[2] *Matangini Dasi* v. *Jogendra Chunder Mullick* (1891), 19 Calc. 84; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 634.

[3] *Rajlukhy Dabee* (*Sm.*) v. *Bhootnath Mookerjee* (1900), 4 C. W. N. 488.

[4] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at pp. 104–107.

[5] *Ibid.*, at p. 107; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 505; *Comulmoney Dossee* v. *Ramnath Bysack* (1843), 1 Fulton, 189, at p. 203.

[6] *Surampalli Bangaramma* v. *Surampalli Brambaze* (1908), 31 Mad. 338; *Virasvami Chetti* v. *Appasvami Chetti* (1863), 1 Mad. H. C. 375.

[7] *Ilata Shavatri* v. *Ilata Narayanan Nambudiri* (1863), 1 Mad. H. C. 372, at pp. 373, 374; *Kullyanessuree Debee* v. *Dwarkanath Surmah Chatterjee* (1866), 6 W. R. C. R. 116. She does not lose the right when she leaves him by his consent. *Nitye Laha* v. *Soondaree Dossee* (1868), 9 W. R. C. R. 475.

[8] See *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A. Sup., vol. 203, at p. 210; 12 B. L. R. 238, at p. 247; 20 W. R. C. R. 21, at p. 24; *Ilata Shavatri* v. *Ilata Narayanan Nambudiri* (1863), 1 Mad. H. C. 372; *Kandasami Pillai* v. *Murugammal* (1898), 19 Mad. 6.

[9] *Nubo Gopal Roy* v. *Amrit Moyee Dossee* (1875), 24 W. R. C. R. 428. See *post*, pp. 89, 91. The decree cannot be altered in execution. There must be a fresh suit. *Ranmalsangji Bhagwatsangji* (*Maharana Shri*) v. *Kundan Kuwar* (*Bai Shri*) (1902), 26 Bom. 707.

[10] See *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392.

[11] Act XXI. of 1850. *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

[12] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492, at p. 494.

out of the whole[1] of the property in which her husband was interested as owner[2] or coparcener[3] at the time of his death, or in which he would have been so interested if he had not been disabled from inheritance, or from being a coparcener,[4] whether she have property of her own or not.[5]

A suit for partition, subsequent to the widow's suit for maintenance, will not affect her right against the whole property.[6] When she has not brought such suit her maintenance will be payable out of the property allotted to the branch of the family to which she belongs.[7]

This applies to impartible property.[8]

A widow is not entitled to maintenance out of property belonging to her husband which had become forfeited to Government on his conviction for rebellion,[9] but her right would be unaffected by a confiscation on account of the rebellion of her sons, or other heirs of her husband.[10]

A mother is entitled to be maintained by her son, and after Right against relations of husband.

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1 *Subbarayulu Chetty* v. *Kamalavallithayaramma* (1911), 35 Mad. 147.

2 *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492, at p. 494; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 106; *Bhagabati Dasi* (*Srimati*) v. *Kanailal Mitter* (1872), 8 B. L. R. 225. As to her maintenance out of property which has been divested on adoption, see *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (1843), 3 M. I. A. 229, at p. 243; 6 W. R. P. C. 43, at p. 45.

3 *Golab Koonwur* (*Mussumat*) v. *Collector of Benares* (1847), 4 M. I. A. 246, at p. 258; 7 W. R. P. C. 47, at p. 51; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410; *Becha* v. *Mothina* (1900), 23 All. 86; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at p. 582, and cases there cited; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199; *Manjappa Hegade* v. *Lakshmi* (1890), 15 Bom. 234; *Jankibai* v. *Shrinivas Ganesh* (1913), 38 Bom. 120; 15 Bom. L. R. 853; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Amrit* (*Bai*) v. *Manik* (*Bai*) (1875), 12 Bom. H. C. 79; *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Lalti Kuar* (*Musammat*) v. *Ganga Bishen* (1875), 7 N. W. P. 261; *Meherban Singh* v. *Sheo Koonwer* (*Mussumat*) (1866), 1 Agra. 106; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 67; *Hema Kooeree* (*Mussamut*) v. *Ajoodhya Pershad* (1875), 24 W. R. C. R. 474. This rule applies to Khoja Mahomedans, *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85.

4 "Mitakshara," chap. ii. s. 10, para. 5; "Dayabhaga," chap. v. paras. 11, 14–16; "Smriti Chandrika," chap. v. paras. 10–14, 20.

5 *Lingayya* v. *Kanakamma* (1913), 38 Mad. 153, differing from *Ramawati Koer* v. *Manjhari Koer* (1906), 4 C. L. J. 74.

6 *Subbarayulu Chetty* v. *Kamalavallithayaramma* (1911), 35 Mad. 147.

7 *Haridas Lalji* v. *Narotam Raghavji* (1911), 14 Bom. L. R. 237.

8 *Sivananja Perumal Sethuroyer* v. *Meenakshi Ammal* (1870), 5 Mad. H. C. 377.

9 *Gunga Baee* v. *Hogg* (1867), 2 Ind. Jur. N. S. 124.

10 *Golab Koonwur* (*Mussumut*) v. *Collector of Benares* (1847), 4 M. I. A. 246; 7 W. R. P. C. 47; explained in *Gunga Baee* v. *Hogg* (1867), 2 Ind. Jur. N. S. 124; and in *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, at pp. 373, 374.

his death out of his property,[1] but with that exception, and also with the exception that a daughter-in-law may enforce a right to maintenance against the property of her father-in-law after his death,[2] a widow has no legal right of maintenance against any of the relatives of her husband, unless they are in possession of property which belonged to her husband, or in which he was a coparcener.[3]

The sale of ancestral property which would have bound her husband if alive, does not give a right against a father-in-law or other coparcener for maintenance.[4]

As to her rights to a share on a partition between her sons or grandsons, see *post*, pp. 333–335.

Although an heir or other person in possession of property may be liable to a widow for her maintenance, he is not liable to other persons on contracts made by her, even on account of her maintenance.[5]

Residence of widow.

A widow is ordinarily entitled to reside in her husband's family dwelling-house.[6]

She cannot be ousted,[7] except by a purchaser who has bought under a decree which binds her, or to whom the property has been sold for the purpose of satisfying claims which are paramount to her right of maintenance,[8] such as for debts incurred for the benefit, or on account of the

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[1] *Subbarayana* v. *Subbakka* (1884), 8 Mad. 236; "Manu," chap. viii. para. 389; Sircar's "Vyavastha Darpana," 2nd ed., pp. 375, 376. She has no such right against her step-son or step-grandson. *Daya* (*Bai*) v. *Natha Govindlal* (1885), 9 Bom. 279. See *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at pp. 582, 583.

[2] *Post*, pp. 210, 211.

[3] *Ganga Bai* v. *Sita Ram* (1876), 1 All. 170, at pp. 174–177; *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. A. C. 15, at p. 35; S. C. *Kasheenath Das* v. *Khetturmonee Dossee* (1868), 9 W. R. C. R. 413, at p. 422; *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573; *Apaji Chintaman Devdhar* v. *Gangabai* (1878), 2 Bom. 632; *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Kanku* (*Bai*) v. *Jadav* (*Bai*) (1883), 8 Bom. 15; *Daya* (*Bai*) v. *Natha Govindlal* (1885), 9 Bom. 279. See, however, *Timmappa Bhat* v. *Parmeshriamma* (1868), 5 Bom. H. C. A. C. 130, where Gibbs, J., said (p. 132), "Every Hindu widow, whether her husband was divided from the family or not, is entitled, when in needy circumstances, to claim from her husband's relatives."

[4] *Ganga Bai* v. *Sita Ram* (1876), 1 All. 170, at p. 177.

[5] *Ramasamy Aiyan* v. *Minakshi Ammal* (1865), 2 Mad. H. C. 409.

[6] *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Devkore* (*Bai*) v. *Sanmukhram* (1888), 13 Bom. 101.

[7] *Dalsukhram Mahasukhram* v. *Lallubhai Motichand* (1883), 7 Bom. 282; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Gauri* v. *Chandramani* (1876), 1 All. 262; *Talemand Singh* v. *Rukmina* (1880), 3 All. 353. See *Parvati* v. *Kisansing* (1882), 6 Bom. 567.

[8] *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Manilal* v. *Tara* (*Bai*) (1892), 17 Bom. 398. See *Mohun Geer* v. *Tota* (*Mussumat*) (1872), 4 N. W. P. 153;

necessities of the family,[1] or perhaps when another suitable residence is found for her.[2]

"The right of residence of Hindu females is ordinarily referable to the family house, and a purchaser may be presumed to have notice of that fact." [3]

This right of the widow is personal to her, and cannot be attached in execution of a decree.[4]

An adult widow [5] is not bound to reside with the relatives of her husband, and she does not forfeit her right to property or maintenance merely on account of her residing with her own family, or leaving her husband's residence from any other cause than for unchaste or improper purposes.[6]

Where the husband has expressly directed that his wife's maintenance should be contingent on her residing in the family residence with his relatives,[7] she would only be entitled to maintenance if she resided in the

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Bhikam Das v. *Pura* (1879), 2 All. 141; *Yamnabai* v. *Nanabhai* (1910), 12 Bom. L. R. 1075.

[1] *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260; *Yamnabai* v. *Nanabhai* (1910), 12 Bom. L. R. 1075; *Kisandas* v. *Rangubai* (1908), 9 Bom. L. R. 382.

[2] *Mangala Debi* v. *Dinanath Bose* (1869), 4 B. L. R. O. C. 72; 12 W. R. O. J. 35.

[3] *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 270; *Yamnabai* v. *Nanabhai* (1910), 3 Bom. L. R. 1075, at p. 1079.

[4] *Salakshi* v. *Lakshmayee* (1908), 31 Mad. 500.

[5] As to a minor widow, see *ante*, p. 66.

[6] *Pirthee Singh* (*Rajah*) v. *Raj Kower* (*Ranee*) (1873), I. A. Sup., vol. 203; 12 B. L. R. 238; 20 W. R. C. R. 21; *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421; *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372 (differing from *Rango Vinayak Dev.* v. *Yamunabai* (1878), 3 Bom. 44); *Surampalli Bangaramma* v. *Surampalli Brambaze* (1908), 31 Mad. 338; *Cossinaut Bysack* v. *Hurrosondry Dossee* (1819), Morley's "Digest," vol. ii. p. 198; Norton, 85; S. C. on appeal (1826), Sircar's "Vyavastha Darpana," 2nd ed., p. 97; Macnaghten's "Considerations of Hindu Law," p. 93; Clarke, 91; Montriou's cases, 445; *Mokhada Dossee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 287; 5 C. W. N. 297, at p. 299; *Siddessury Dassee* v. *Janardan Sarkar* (1902), 29 Calc. 557; 6 C. W. N. 530 (a case of a widowed daughter-in-law); *Koodee Monee Debea* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134 (ditto); *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Ahollya Bhai Debia* v. *Luckhee Monee Debia* (1866), 6 W. R. C. R. 37; *Chandrabhagabhai* v. *Kashinath Vithal* (1866), 2 Bom. H. C. 341, 2nd ed., 323; *Jadumani Dasi* v. *Kheytramohan Shil* (1854), Sircar's "Vyavastha Darpana," 2nd ed., p. 384; *Shurno Moyee Dassee* v. *Gopal Lall Doss* (1863), Marshall, 497; *Umrit Koweree* v. *Kidernath Ghose* (1868), 3 Agra. H. C. 182; *Parvatibai* v. *Chatru* (1911), 13 Bom. L. R. 1023. In *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81, the Judicial Committee said that it is in the husband's family that in strict contemplation of law the widow ought to reside.

[7] *Mulji Bhaishankar* v. *Bai Ujam* (1888), 13 Bom. 218; *Girianna Murkundi Naik* v. *Honama* (1890), 15 Bom. 236. See *Shurno Moyee*

house in which her husband required her to be maintained, or if she from just cause abstained from residing in that house.[1]

Where the family property is so small that the family cannot bear the strain of supporting the widow in a separate lodging, though it might be able to provide her with food in the family house, a Court might well in the exercise of its discretion refuse separate maintenance,[2] or, at any rate, in fixing the maintenance might decline to allow any amount on account of the expenses of a residence.[3]

By remarriage a widow loses her right to maintenance out of her husband's estate.[4]

Loss of right. A widow by unchastity forfeits her right of maintenance,[5] even if such maintenance has been secured by agreement[6] or decree;[7] but where the maintenance has been given by a will it is not forfeited unless there be an express provision in the will.[8]

Where the agreement for maintenance is made by way of compromise of a claim for something more than maintenance, unchastity would not, in the absence of express provision, destroy the right to maintenance.[9]

Dassee v. *Gopal Lall Doss* (1863), Marshall, 497; *Pirthee Singh (Rajah)* v. *Raj Kower (Ranee)* (1873), I. A. Sup. Vol. 203, at p. 210; 12 B. L. R. 238, at p. 247; 20 W. R. C. R. 21, at p. 24; *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421; *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490, at pp. 496, 497; Sircar's "Vyavastha Darpana," 2nd ed., p. 370.

[1] As to "just cause," see *Promothanath Roy* v. *Nagendrabala Chaudhrani* (1908), 12 C. W. N. 808.

[2] *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372, at p. 376; *Godavaribai* v. *Sagunabai* (1896), 22 Bom. 52.

[3] See *Ramchandra Vishnu Bapat* v. *Sagunabai* (1879), 4 Bom. 261.

[4] Hindu Widows' Remarriage Act (XV. of 1856), s. 2, *post*, pp. 369, 370.

[5] *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392; *Valu* v. *Ganga* (1882), 7 Bom. 84; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108; *Roma Nath* v. *Rajonimoni Dasi* (1890), 17 Calc. 674; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150, at p. 160; *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 151; 5 Calc. 776, at p. 786; 6 C. L. R. 322, at p. 330; *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at pp. 72, 73; 19 W. R. C. R. 367, at p. 405; *Muttammal* v. *Kamakshy Ammal* (1865), 2 Mad. H. C. 337; *Sinthayee* v. *Thanakapudayen* (1868), 4 Mad. H. C. 183, at 185; *Bussunt Koomaree (Maharanee)* v. *Kummul Koomaree (Maharanee)* (1843), 7 Ben. Sel. R. 144, new edition, 168; Macnaghten's "Hindu Law," vol. ii. chap. ii. case 5, pp. 112, 113; Strange's "Hindu Law," vol. i. p. 172, vol. ii. p. 310; "Mitakshara," chap. ii. s. 1, para. 7; "Dayabhaga," chap. xi. s. 1, para. 48.

[6] *Nagamma* v. *Virabhadra* (1894), 17 Mad. 392; *Sathyabhama* v. *Kesavacharya* (1915), 39 Mad. 658.

[7] *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; see *post*, p. 91.

[8] *Parami* v. *Mahadevi* (1909), 34 Bom. 278; 13 Bom. L. R. 196.

[9] *Bhup Singh* v. *Lachman Kunwar* (1904), 26 All. 321.

It is unsettled whether an unchaste wife or widow, on returning to a moral life, is entitled to what is called "starving maintenance," that is to say, just sufficient food to keep her alive. It is submitted that she is so entitled. In *Honamma* v. *Timannabhat*[1] the Bombay High Court allowed the right, but it was disallowed by the same Court in *Valu* v. *Ganga*.[2] In a recent Bombay case, the following was said, "The general rule to be gathered from 'the texts' is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint, and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence."[3] The Madras High Court[4] has held that there is such right. In an earlier case[5] the same Court considered the question unsettled. In *Romanath* v. *Rajonimoni Dasi*[6] the Bengal High Court was inclined to allow the right. Earlier authority is in favour of the right.[7] It is submitted that the better view is that the right should be allowed.

"Starving maintenance."

She is not entitled even to "starving maintenance," so long as she persists in a vicious life,[8] but it has been held that where "starving maintenance" has been allotted to her by decree, subsequent unchastity does not destroy the right.[9]

Mere loss of caste does not involve a loss of a right of maintenance.[10]

Burden of proof.

Where there is property liable for the maintenance of a widow, it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto.[11]

For example, they may show that she resides separately from her husband's family for immoral purposes,[12] or that the family property is

[1] (1877), 1 Bom. 559.

[2] (1882), 7 Bom. 84.

[3] *Parami* v. *Mahadevi* (1909), 34 Bom. 273, at p. 283; 12 Bom. L. R. 196, at p. 200.

[4] *Sathyabhama* v. *Kesavacharya* (1915), 39 Mad 658; *contrà Nagamma* v. *Virabhadra* (1894), 17 Mad. 392.

[5] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

[6] (1890), 17 Calc. 674, at p. 679.

[7] Steele, para. xxv. (new edition), p. 36; Strange's "Hindu Law," vol. i. pp. 172, 175, vol. ii. p. 39; "Vyavahara Mayukha," chap. iv. s. 8, para. 9; "Mitakshara," chap. ii. s. 1, paras. 37, 38; Colebrooke's "Digest," vol. ii. pp. 423–425. See Norton's "Leading Cases," vol. i. p. 37.

[8] *Kandasami Pillai* v. *Murugammal* (1895), 19 Mad. 6; *Romanath* v. *Rajonimoni Dasi* (1890), 17 Calc. 674, at p. 679; *Daulta Kuari* v. *Meghu Tiwari* (1893), 15 All. 382; *Debi Saran Shukul* v. *Doulata Shuklain* (1916), 39 All. 234; *Muttammal* v. *Kamakshy Ammal* (1865), 2 Mad. H. C. 337; see, however, *Parami* v. *Mahadevi* (1909), 34 Bom. 278; 12 Bom. L. R. 196.

[9] *Honamma* v. *Timannabhat* (1877), 1 Bom. 559.

[10] Act XXI. of 1850. See *Queen* v. *Marimuttu* (1881), 4 Mad. 243.

[11] See *Saboo Sidick (Haji)* v. *Ayeshabai* (1903), 30 I. A. 127; 27 Bom. 485; 7 C. W. N. 665; 5 Bom. L. R. 475.

[12] *Kasturbai* v. *Shivajiram Devkurna* (1879), 3 Bom. 372, at p. 381.

so small as not reasonably to admit of an allotment to her of a separate maintenance, or that she has other means of maintenance.[1]

Transfer of right.

A wife or widow cannot transfer her rights to maintenance.[2]

Attachment.

It has been said that maintenance which has been fixed by agreement or decree may be transferable,[3] but it is submitted that the terms of s. 6 (*d*) of the Transfer of Property Act (IV. of 1882) prevent such transfer.

There is, it is submitted, no reason why arrears of maintenance should not be transferable.[4]

A right to future maintenance,[5] or an interest in the income of immovable property assigned by way of maintenance,[6] cannot be attached in execution of a decree, but there is nothing to prevent the attachment of arrears of maintenance.[7]

Loss of maintenance by transfer of property.

Unless their rights are secured by an arrangement or by decree,[8] it is submitted that a Hindu can by a transfer for consideration dispose of his property so as to deprive his wife or such other person whom he is legally bound to maintain[9] of any right of maintenance against the property so disposed of,[10] except where such transfer is made with the intention of defeating the right, and the transferee has notice of such intention.[11]

As to an alienation pending suit, see *post*, p. 93.

Gift or will.

Provided he leaves sufficient property for the maintenance of his widow and those whom by law he is legally bound to

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[1] See *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490, at p. 496.

[2] See *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at pp. 103, 104.

[3] *Annapurni Nachiar (Rani)* v. *Swaminatha Chettiar* (1910), 34 Mad. 7, at p. 9.

[4] See *Endoori Venkataramaniah* v. *Venkatachainulu* (1909), 33 Mad. 80.

[5] Civil Procedure Code (V. of 1908), s. 60.

[6] *Gulab Kuar* v. *Bansidhar* (1893), 15 All. 371.

[7] *Ibid.* See *A. P. Rajerav Chandrarao* v. *Nanarav Krishna Jahagirdar* (1887), 11 Bom. 528; *Asad Ali Mollah* v. *Haidar Ali* (1910), 38 Calc. 13.

[8] *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Calc. 194. See *post*, p. 91.

[9] As where the right is to be maintained from coparcenary property, *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49.

[10] See *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69; *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268.

[11] *Imam* v. *Balamma* (1889), 12 Mad. 334; *Beharilalji* v. *Rajbai (Bai)* (1898), 23 Bom. 342; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 516. *Cf.* Transfer of Property Act (IV. of 1882), s. 39, *post*, pp. 90, 91.

support, but not otherwise,[1] a Hindu can dispose of his property by gift or will, so as to free it from claims to maintenance.[2]

He cannot by will exclude her right of maintenance,[3] and he cannot by disposing of the whole of his property by will [4] or gift [5] deprive his widow of her right to be maintained out of such property.

Maintenance of concubines.

A concubine, who has been kept by a Hindu up to the time of his death, is entitled to maintenance [6] from the property (whether ancestral or self-acquired) of her deceased paramour, whether she have children or not,[7] but loses the right by incontinence.[8]

A woman with whom a Hindu has only had casual intercourse,[9] or one with whom he has carried on an adulterous intrigue,[10] acquires no such right.

A discarded concubine has no right of maintenance against her paramour, or his estate.[11]

Independent means of support.

The right to maintenance cannot be enforced where the

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[1] *Jamna* v. *Machal Sahu* (1879), 2 All. 315; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at pp. 106, 108.

[2] *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886; *Bhoobunmoyee Debia Chowdhrain* v. *Ramkishore Acharj Chowdhry*, Ben. S. D. A., 1860, p. 485, at p. 489; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306. See *Razabai* v. *Sadu* (1871), 8 Bom. H. C. A. C. J. 98; *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490, at p. 494; answers of law officers in *Mulraz Lachmia* v. *Chalekany Vencata Rama Jaganadha Row* (1838), 2 M. I. A. 54, at p. 57. The widow's claim to maintenance cannot be defeated merely by implication. *Joytara* v. *Ramhari Sirdar* (1884), 10 Calc. 638; *Comulmony Dossee* v. *Rammanath Bysack* (1843), 1 Fulton, 189, at p. 193. See Act XXI. of 1870, s. 3.

[3] See *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (1908), 12 C. W. N. 808.

[4] *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99; *Jamna* v. *Machul Sahu* (1879), 2 All. 315; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306; *Krishnarao* v. *Bhagwantrao* (1900), 2 Bom. L. R. 1082; *Becha* v. *Mothina* (1900), 23 All. 86.

[5] See Act IV. of 1882 (Transfer of Property), s. 39, *post*, pp. 90, 91.

[6] *Ningareddi* v. *Lakshmawa* (1901), 26 Bom. 163; 3 Bom. L. R. 647; *Ramanarasu* v. *Buchamma* (1899), 23 Mad. 282, at p. 291.

[7] *Yashvantrav* v. *Kashibai* (1887), 12 Bom. 26; *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381; *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229; Macnaghten's "Hindu Law" vol. ii. chap. ii. case 12; Strange's "Hindu Law," vol. i. p. 174; "Mitakshara," chap. ii. s. 1, paras. 7, 27, 28; "Vyavahara Mayukha," chap. iv. s. 8, para. 5.

[8] *Yashvantrav* v. *Kashibai* (1887), 12 Bom. 26. See "Dayabhaga," chap. xi. s. 1, para. 48.

[9] *Sikki* v. *Vencatasamy Gounden* (1875), 8 Mad. H. C. 144.

[10] *Sikki* v. *Vencatasamy Gounden* (1875), 8 Mad. H. C. 144. In *Khemkor* v. *Umiashankar Ranchhor* (1873), 10 Bom. H. C. 381, above, note 7, the connection was apparently an adulterous one.

[11] *Ramanarasu* v. *Buchamma* (1899), 23 Mad. 282.

wife, or widow, or other person claiming it has full independent means of support [1] from property in possession capable of providing maintenance,[2] whether derived from her husband's property or from some other source. Where there is independent means of support, it must always be taken into account in fixing the amount of maintenance.[3]

Jewels and other property which are unproductive of income need not be taken into account.[4]

A previous provision of maintenance must be taken into account,[5] even though it may have been expended.[6]

It has been held that a widow cannot enforce her right against property in which her husband was a coparcener, if the husband's separate property be sufficient for her maintenance.[7] No reasons were given for this proposition.

Amount of maintenance, wife.

The amount which a wife is entitled to receive for her maintenance would ordinarily depend upon the position in life of the husband, the extent of his property, and the claims upon him being taken into consideration.

The views of the husband on the subject of the amount, whether expressed in his will or elsewhere, may be taken into consideration, but are not conclusive.[8]

Yajnavalkya [9] fixed one-third of the husband's property as the proper amount, and this view has been acted upon in Bombay,[10] but the Courts will not now consider themselves bound by any such fixed rule.[11]

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[1] *Siddessury Dossee* v. *Janardan Sarkar* (1902), 29 Calc. 557, at p. 576; 6 C. W. N. 530, at p. 547; *Chandrabhagabai* v. *Kashinath Vithal* (1866), 2 Bom. H. C., 2nd ed., 323; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at p. 584; Strange's "Hindu Law," vol. i. p. 171, vol. ii. p. 305. See *Dattatraya* v. *Rukhmabai* (1908), 33 Bom. 50; 10 Bom. L. R. 770.

[2] Not a mere right of action, see *Gokibai* v. *Lakhmidas Khimji* (1890), 14 Bom. 490.

[3] See *Mahesh Partab Singh* v. *Dirgpal Singh* (1899), 21 All. 232. As to the case of maintenance provided for in a will, see *Narayani Dasi* v. *Administrator-General of Bengal* (1894), 21 Calc. 683.

[4] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63; Strange's "Hindu Law," vol. ii. p. 305. See *Joytara* v. *Ramhari Sirdar* (1884), 10 Calc. 638.

[5] See *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.

[6] See *Savitribai* v. *Luximibai* (1878), 2 Bom. 573.

[7] See *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[8] See *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (1908), 12 C. W. N. 808.

[9] Colebrooke's "Digest," vol. ii. p. 420; "Vyavahara Mayukha," chap. xx. para. 1; see also Strange's "Hindu Law," vol. ii. pp. 45, 48, 51.

[10] *Ramabai* v. *Trimbak Ganesh Desai* (1872), 9 Bom. H. C. 283.

[11] See Macnaghten's "Hindu Law," vol. ii. case 3; Banerjee's "Law of Marriage," 3rd ed., p. 152. See cases as to amount of maintenance of widow, *post*, p. 87, notes 4, 5.

The conduct of the claimant to maintenance,[1] and, it is said,[2] the conduct of the husband, may be taken into consideration.

Conduct.

Amount of maintenance, widow.

In fixing the amount of maintenance for a widow, provision must be made for her reasonable wants, namely, for the performance of charities and the discharge of religious obligations, such as religious ceremonies which by custom it is proper for her to perform,[3] in addition to reasonable provision for her food, raiment, and residence, having regard to the amount of the estate which is liable for her maintenance, her position in life, and the circumstances of the family.[4]

Principle of allotment of maintenance.

The following has been held [5] to be the principle upon which maintenance is to be allotted to a widow:—

"Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's lifetime and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate."

The principles applicable to the fixing of the amount of maintenance of a widow apply *mutatis mutandis* to the cases of other claimants to maintenance.[6]

The life of austerity in which, according to the Shasters, a Hindu widow is required to live, is not taken into consideration; [7] but, on the

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[1] See *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.

[2] Banerjee's "Law of Marriage," 3rd ed., p. 152.

[3] See *Sundarji Damji* v. *Dahibai* (1904), 29 Bom. 316; 6 Bom. L. R. 1052.

[4] *Nittokissoree Dossee* v. *Jogendro Nauth Mullick* (1878), 5 I. A. 55, at pp. 56, 57; *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1916), 43 I. A. 249; 44 Calc. 186; 21 C. W. N. 225; 18 Bom. L. R. 368; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410, at p. 418; *Baisni* v. *Rup Singh* (1890), 12 All. 558; *Hurry Mohun Roy* v. *Nyantara (Sreemutty)* (1876), 25 W. R. C. R. 474; *Dalel Kunwar* v. *Ambika Partap Singh* (1903), 25 All. 266, at pp. 269, 270; *Karoonamoyee Dabee (Sm.)* v. *Administrator-General of Bengal* (1890), 9 C. W. N. 651. See *Narhar Singh* v. *Dirgnath Kuar* (1879), 2 All. 407, where it was held that the fact that the widow had had a son made no difference in the amount to which she was entitled; *Comulmoney Dossee* v. *Rammanath Bysack* (1843), 1 Fulton, 189; *Oojul Munnee Dosee* v. *Jygopal Chowdhree*, Ben. S. D. A. 1848, p. 491; *Bheeloo (Mussummaut)* v. *Phool Chund* (1824), 3 Ben. Sel. R. 223, new edition, 298.

[5] *Karoonamoyee Dabee (Sm.)* v. *Administrator-General of Bengal* (1889), 9 C. W. N. 651, at pp. 652, 653.

[6] See *Mahesh Partab Singh* v. *Dirgpal Singh* (1899), 21 All. 232.

[7] *Hurry Mohun Roy* v. *Nyantara (Sreemutty)* (1876), 25 W. R. C. R. 474, at p. 476; *Baisni* v. *Rup Singh*

other hand, a widow is not necessarily entitled to be maintained in such a way that she can live in the same style as she lived in when her husband was alive.[1]

Any saving that she may make by living with her own family is not to be taken into account.[2]

There is no general rule as to the amount of maintenance to be allotted to the person entitled thereto. The amount of the property available, the claims of the different persons entitled to maintenance thereout, and the reasonable wants of the claimant for the support of himself and his family in accordance with the position of the family must all be taken into consideration.[3]

"The amount of the property . . . is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position and conduct of the claimant . . . may reduce the maintenance."[4]

The necessities of the claimant are also not the sole criterion.[5]

Limited to husband's share.

A widow is not entitled to maintenance in excess of the annual proceeds of the share to which her husband would have been entitled on partition if he were living.[6]

If the produce of such share be insufficient for her support, it might be necessary to sell the share, and support her out of the proceeds.

Funeral expenses.

Her funeral expenses are also payable out of the estate chargeable with her maintenance.[7]

Debts have priority.

The maintenance of a wife or widow is postponed to the payment of the debts of the husband, or of the family, as the case may be.

Maintenance charged on property.

It is not settled whether debts take precedence of maintenance which is charged upon property by a decree or agreement. In two Allahabad cases,[8] in which the question did not arise, the Court held that debts had such precedence. It is submitted that maintenance charged by a decree

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(1890), 12 All. 558, at p. 563; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[1] *Kalleepersaud Singh* v. *Kupoor Koowaree* (1865), 4 W. R. C. R. 65.

[2] *Hurry Mohun Roy* v. *Nyantara (Sreemutty)* (1876), 25 W. R. C. R. 474, at p. 476.

[3] See *Mahesh Partab Singh* v. *Dirgpal Singh* (1899), 21 All. 232.

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 82; 9 B. L. R. 377, at p. 413; 18 W. R. C. R. 359, at p. 373.

[5] *Bhugwan Chunder Bose* v. *Bindoo Bashinee Dassee* (1866), 6 W. R. C. R. 286.

[6] *Mahadrav Keshav Tilak* v. *Gangabai* (1878), 2 Bom. 639; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199, at p. 209; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 72.

[7] *Ratanchund* v. *Javherchand* (1897), 22 Bom. 818; *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450; *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (1908), 32 Mad. 191; *Ramdhari Singh* v. *Permanund Singh* (1913), 19 C. W. N. 1183.

[8] *Sham Lal* v. *Banna* (1882), 4 All. 296, at p. 300; *Gur Dayal* v. *Kaunsila* (1883), 5 All. 367.

is on the same footing as a mortgage, and takes precedence of subsequent charges, and of all simple contract debts[1] created by or entered into by the person against whom the decree is made, or his representatives. Maintenance charged by an agreement would also, it is submitted, when there is no fraud upon creditors, take precedence of the debts of the person entering into the agreement, or his representative, provided the agreement complies with the provisions of the Transfer of Property Act.[2] Maintenance charged by a will would not take precedence of the debts of the testator.

Maintenance not a charge.

The maintenance of a wife or widow is in one sense a charge upon the property of the husband, whether ancestral or self-acquired,[3] as it is payable thereout, but it is not a charge in the fullest sense of the term, because it does not necessarily bind any part of the property in the hands of a purchaser.[4] It becomes a complete charge if it be fixed and charged upon such property, or a portion thereof, by a decree or by agreement,[5] or by a will.[6]

This applies to the claims of other persons entitled to maintenance.[7]

Effect of decree.

It has been held that where a widow obtains a decree which creates a charge for maintenance, and takes no steps in execution, a subsequent purchaser is not bound by the decree.[8] It is submitted that the charge

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1 *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Cal. 194; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524. See cases *post*, note 5.

2 Act IV. of 1882, s. 59. See definition of "mortgage," s. 58.

3 *Hemangini Dasi* (*Srimati*) v. *Kedarnath Kudu Chowdhry* (1889), 16 I. A. 115; 16 Cal. 758; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99; *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 271; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494. In *Kalpagathachi* v. *Ganapathi Pillai* (1881), 3 Mad. 184, at p. 191, the right was described as "a mere equity to a provision."

4 *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888). 15 Calc. 292, at p. 307; *Sham Lal* v. *Banna* (1882), 4 All. 296; *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Digambari Debi* v. *Dhan Kumari Bibi* (1906), 10 C. W. N. 1074. See *Ramanadan* v. *Rangammal* (1888); 12 Mad. 260, at p. 272; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130.

5 *Mahalakshmamma Garu* (*Sri Maniyam*) v. *Venkataratnamma Garu* (*Sri Maniyam*) (1882), 6 Mad. 83, at p. 86; *Bhagirathi* v. *Ananta Charia* (1893), 17 Mad. 268; *Yamnabai* v. *Nanabhai* (1910), 12 Bom. L. R. 1075; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 75, explaining *Heera Lall* v. *Kousillah* (*Mussumat*) (1867), 2 Agra, 42; *Juggernath Sawunt* v. *Odhiranee Narai Koomaree* (1873), 20 W. R. C. R. 126.

6 See *Beharilalji Bhagwatprasadji* (*Shri*) v. *Rajbai* (*Bai*) (1898), 23 Bom. 342. Where the will directs maintenance but creates no charge, it would apparently be otherwise, see *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 118; 3 Bom. 415, at p. 420.

7 *Beer Chunder Manikkya* v. *Nobodeep Chunder Deb Burmono* (*Raj Coomar*) (1883), 9 Calc. 535, at p. 555; 12 C. L. R. 465, at pp. 471, 472.

8 *Bhoje Mahadev Parab* v. *Gangabai* (1913), 37 Bom. 621; 15 Bom. L. R. 809.

by decree has the same effect as a mortgage and binds subsequent purchasers.

Decree against manager of family.

Where a charge for maintenance has been imposed upon family property by a decree in a suit against the representative of the family, as such, a member of the family who was not a party to a suit cannot dispute the decree.[1] It is otherwise in the case of a decree against the father,[2] or other member of the family personally. A mere personal decree for maintenance does not create a charge.[3]

Right to dispute will.

By virtue of her right to maintenance a widow is entitled to contest the *factum* of her husband's will,[4] or to discuss its construction so far as it affects her maintenance.[5] She does not thereby acquire a right to dispute the will of her son.[6]

Transfer of property when claim to maintenance thereout.

The question as to whether a *bonâ fide* purchaser for valuable consideration is bound to satisfy a right of maintenance out of the property purchased by him has been the subject of considerable discussion in the Courts.

Although the 39th section of the Transfer of Property Act [7] is not to be deemed as affecting any rule of Hindu law,[8] its provisions are, it is submitted, in the main coincident with the law as laid down in the decisions.[9]

That section is as follows:—

"Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property,[10] and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

Illustration.

A, a Hindu, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such

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1 *Minakshi Achi* v. *Chinnappa Udayan* (1901), 24 Mad. 689; *Subbanna Bhatta* v. *Subbanna* (1907), 30 Mad. 324.

2 *Muttia* v. *Virammal* (1887), 10 Mad. 283.

3 *Muttia* v. *Virammal* (1887), 10 Mad. 283; *Karpakambal Ammal* v. *Ganapathi Subbayyan* (1882), 5 Mad. 234; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268; *Minakshi Achi* v. *Chinnappa Udayan* (1901), 24 Mad. 689, at p. 694; *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365.

4 *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1885), 11 Calc. 492.

5 *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (1908), 12 C. W. N. 808.

6 *Garabini Dassi* v. *Pratap Chandra Shaha* (1900), 4 C. W. N. 602.

7 IV. of 1882.

8 Act IV. of 1882, s. 2.

9 See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494; *Yamnabai* v. *Nanabhai* (1910), 12 Bom. L. R. 1075.

10 This includes coparcenary property: *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45, at p. 49.

of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

The first portion of this section refers only to transfers made with the intention of defeating the right, but the latter portion, taken with the illustration, shows that it extends to other cases.

The following propositions are, it is submitted, justified by the decisions :—

1. A purchaser would be bound by a decree charging the property with the maintenance,[1] except where the purchase had been made in execution of a decree, which bound the widow, or which enforced a claim, which under the Hindu law takes precedence of a claim to maintenance.[2]

"When the maintenance has been expressly charged on the purchased property, it will be liable, although it be shown that there is property in the hands of the heirs sufficient to meet the claim." [3]

2. A purchaser would be bound by an agreement for maintenance which satisfies the conditions required for a mortgage under the Transfer of Property Act,[4] or which has been followed by possession.

He would also, it is submitted, be bound by an agreement, which did not satisfy such conditions, but which was enforceable against a transferee with notice of such agreement.[5]

3. When the maintenance is not charged on the property by a decree, or by an agreement equivalent to a mortgage, the purchaser is bound by the right to maintenance if the transfer be made with the intention of defeating the right, and he has notice of such intention.[6]

4. When the maintenance is not so charged, and there is no such intention, or if there be such intention, the purchaser

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[1] See *Kuloda Prosad Chatterjee* v. *Jageshar Koer* (1899), 27 Calc. 194; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524.

[2] *Shamlal* v. *Banna* (1882), 4 All. 296, at p. 300. Such as a debt incurred before the creation of the charge by the person out of whose property the maintenance is payable, *Gur Dayal* v. *Kaunsila* (1883), 5 All. 367.

[3] *Shamlal* v. *Banna* (1882), 4 All. 296, at p. 300.

[4] IV. of 1882, ss. 58, 59; *ante*, p. 89, note 2.

[5] See *post*, p. 92.

[6] Act IV. of 1882, s. 39. See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524. This involves a fraudulent intention: *Digambari Debi* v. *Dhan Kumari Bibi* (1906), 10 C. W. N. 1074.

has no notice thereof, a *bonâ fide* [1] purchaser is not affected by the claim, whether he has notice of such claim or not.[2]

In earlier cases it was held that a *bonâ fide* purchaser without notice was not affected by the claim, but that a purchaser with notice of the claim [3] or, at any rate, with notice of the existence of a claim likely to be unjustly impaired by the proposed transaction,[4] or, as it has been put in another case,[5] a notice that the right cannot be satisfied without recourse to the property purchased, was subject to it.

There is also authority that the widow must exhaust her remedies against the heir, or, at any rate, prove that there is no property of the deceased in the hands of the heir before recovering against the purchaser.[6] The inconvenience of this doctrine has been pointed out by the Bombay High Court.[7]

The Hindu law places on the same footing all the so-called charges on the inheritance,[8] as debts,[9] expenses of initiation of sons,[10] and marriage

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[1] *I.e.* the property must be bought upon a rational and honest opinion that the sale was one which could be effected without any furtherance of wrong; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 524.

[2] *Ram Kunwar* v. *Ram Dai* (1900), 22 All. 326; *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160. See *Shamlal* v. *Banna* (1882), 4 All. 296; *Soorja Koer* v. *Nath Buksh Singh* (1884), 11 Calc. 102; *Johurra Bibee* v. *Sreegopal Misser* (1876), 1 Calc. 470; *Natchiarammal* v. *Gopalakrishna* (1879), 2 Mad. 126, and cases *ante*, p. 89, notes 4, 5. There are observations in *Amrita Lal Mitter* v. *Manick Lal Mullick* (1900), 27 Calc. 551, 4 C. W. N. 764, to the contrary effect, but that was a case of a transfer of an undivided share of the whole property.

[3] See *Bhagabati Dasi* (*Srimati*) v. *Kanailal Mitter* (1872), 8 B. L. R. 225; 17 W. R. C. R. 433, note. *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, and cases there cited; *Rachawa* v. *Shivayogapa* (1893), 18 Bom. 679; *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69; *Goluck Chunder Bose* (*Baboo*) v. *Ohilla Daye* (*Ranee*) (1876), 25 W. R. C. R. 100; *Heera Lall* v. *Kousillah* (*Mussumat*) (1867), 2 Agra. 42. (In the last case the transfer was in terms subject to a specified sum for the maintenance of the widow.) Any fact which would put the purchaser upon inquiry would amount to notice. Thus possession by the widow of the family dwelling-house or of other property may amount to notice. See *Ramanadan* v. *Rangammal* (1888), 12 Mad. 260, at p. 272; *Imam* v. *Balamma* (1889), 12 Mad. 334; *Yamnabai* v. *Nanabhai* (1910), 12 Bom. L. R. 1075.

[4] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 517.

[5] *Ramanadan* v. *Rangammal* (1889), 12 Mad. 260, at p. 269.

[6] *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (1876), 1 Calc. 365, at p. 377; *Ram Churun Tewaree* v. *Jasooda Koonwer* (1867), 2 Agra. 134; *contrâ Goluck Chunder Bose* (*Baboo*) v. *Ohilla Daye* (*Ranee*) (1876), 25 W. R. C. R. 100.

[7] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at pp. 515, 520.

[8] Strange's "Hindu Law," vol. i. chap. viii. In *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163, the Court said, "In fact, a widow's right to receive maintenance is one of an indefinite character, which, unless made a charge upon the property, by agreement or by decree of the Court, is only enforceable like any other liability in respect of which no charge exists."

[9] "Mitakshara," chap. ii. s. 11, para. 24; "Vyavahara Mayukha," chap. v. s. 4, paras. 12, 14, 16, 17, 19.

[10] "Vyavahara Mayukha," chap. iv. s. 4, paras. 38–40; "Mitakshara,"

of daughters.[1] It could scarcely be that a *bonâ fide* purchaser, even with notice of the existence of a claim in respect of any one of these so-called charges, should bear the burden of their payment.[2] In a case where the money had been raised by purchase for the purpose of paying any of these charges it would follow that the purchaser would be under no liability.[3] Would it be reasonable in any case, except where the transaction was intended to the knowledge of the purchaser to be a fraud upon the charge, to require a purchaser from an absolute owner to inquire as to the purposes for which the money was being raised? Moreover, the texts give a charge on the inheritance to wives as to widows, but a wife cannot enforce her maintenance against a purchaser from her husband.[4]

"If there is an ample estate out of which to provide for the widow, so that she may get her claim fixed and secured, or if, knowing of the proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetting it, can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the coparcener in satisfaction of her claim; if she lives apart, and the estate is small and insufficient, it is the vendee's duty before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor." [5]

Transfer or partition pending suit.

A right of maintenance is not affected by a transfer[6] made or a suit for partition brought[7] during the pendency of a suit for maintenance, unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance.[8]

Where the suit for maintenance does not seek to charge specific property, the doctrine of *lis pendens* does not apply.[9]

Possession of property by widow.

An heir or coparcener,[10] or devisee,[11] or a purchaser with

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chap. i. s. 7, paras. 3–6; Colebrooke's "Digest," bk. v. paras. cxxiii., cxxv., cxxxii.

[1] Colebrooke's "Digest," bk. v. para. cxxiv.

[2] A creditor cannot follow the assets of an estate into the hands of a *bonâ fide* purchaser. See *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 78, and cases there cited.

[3] See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 499.

[4] See *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 78.

[5] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 517.

[6] See Transfer of Property Act (IV. of 1882), s. 52; *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; S. C. *sub nomine Jogendro Chunder Ghose* v. *Ganendra Nath Sircar*, 4 C. W. N. 254. See *Amrita Lal Mitter* v. *Manick Lal Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764.

[7] *Ante*, p. 79.

[8] *Dose Thimmanna Bhutta* v. *Krishna Tantri* (1906), 29 Mad. 508.

[9] *Manika Gramani* v. *Ellappa Chetti* (1896), 19 Mad. 271, see *ante*, p. 79.

[10] *Yellawa* v. *Bhimangavda* (1893), 18 Bom. 452.

[11] *Razabai* v. *Sadu* (1871), 8 Bom. H. C. A. C. J. 98.

notice of her claim and possession,[1] cannot oust a widow from property which is liable for her maintenance, without securing her maintenance.

The possession would, it is submitted, be in this case evidence of an arrangement charging the property.[2]

Right against proceeds of sale.

A widow may enforce her right of maintenance against the proceeds of the property in the hands of the heir.[3]

Where property held on mortgage has been allotted to a widow for her maintenance, and the mortgage has been paid off, the right of the widow attaches to the money.[4]

As to the allotment of a share to a mother or grandmother in lieu of her maintenance in case of partition between her sons or grandsons, see *post*, pp. 333 *et seq.*

Suit for maintenance.

Suits for arrears.

A widow may, for the purpose of securing her maintenance, sue to compel the persons in possession of the estate, out of which the maintenance is payable, to give security for the due payment of her maintenance, or to have it made a charge upon the estate, and may, in a proper case, obtain an injunction to restrain them from wasting or alienating the estate.[5] If she does not wish for such charge, she may sue for maintenance already due,[6] or for a declaration that it is payable, or she may combine a claim for arrears with a prayer for a charge or for security.

Although a Court may award arrears,[7] a decree for arrears is not of

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[1] *Imam* v. *Balamma* (1889), 12 Mad. 334; *Rachawa* v. *Shivayogappa* (1893), 18 Bom. 679.

[2] *Ante*, p. 89.

[3] See *Venkatammal* v. *Andyappa* (1882), 6 Mad. 130, at p. 135; *Ram Churun Tewaree* v. *Jasooda Koonwer* (1867), 2 Agra. 134; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 519.

[4] *Gambhirmal* v. *Hamirmal* (1896), 21 Bom. 747.

[5] *Ramanadan* v. *Rangammal* (1889), 12 Mad. 260, at pp. 267, 268; *Mahalakshmamma Garu (Sri Maniyam)* v. *Venkataratnamma Garu (Sri Maniyam)* (1882), 6 Mad. 83. See *Brinda Chowdhrain* v. *Radhika Chowdhrain* (1885), 11 Calc. 492, at p. 494.

[6] *Pirthee Singh (Raja)* v. *Rajkooer (Rani)* (1873), I. A. Sup. Vol. 203; 12 B. L. R. 238; 20 W. R. C. R. 21; *Venkopadhya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36; *Sakwarbai* v. *Bhavanjee Raje* (1864), 1 Bom. H. C. 194; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99. See *Bhartpur State* v. *Gopal Dei* (1901), 24 All. 160, at p. 163.

[7] *Pirthee Singh (Rajah)* v. *Raj Kower (Ranee)* (1873), I. A. Sup. Vol. 203, at p. 211; 12 B. L. R. 238, at p. 248; 20 W. R. C. R. 21, at p. 25; *Venkopadhyaya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36; *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Mandodari Debi* v. *Joynarayan Pakrasi* (1833), Sircar's "Vyavastha Darpana," p. 381; Montriou's "Cases of Hindu Law," pp. 408–412.

right, but is in the discretion of the Court,[1] and depends upon her wants and exigencies.[2] Where the person claiming maintenance has been supported, without having incurred any expense or liability, the Court might well exercise its discretion by refusing to grant arrears.

Future maintenance.

The Court should discourage a multiplicity of suits for the maintenance of one person, and should, if possible, where necessary, make a decree for future maintenance.[3]

The widow is not entitled to sue for possession of the property.[4]

A wife, who is entitled to separate maintenance, has apparently similar remedies.

Enforcement of agreement.

When maintenance is fixed by an agreement, which is equivalent to a mortgage, it may be enforced by a suit under the Transfer of Property Act.[5]

Parties to suit.

The widow is entitled to sue all or any of the heirs in possession of property subject to her maintenance.[6]

When the right of maintenance has been made a charge by agreement or decree the claimant may recover the amount from any person holding any portion of the property liable.[7] The person paying it would have a right of contribution against other persons liable therefor.[8]

When right to sue commences.

The right to sue for maintenance commences when there has been a wrongful withholding of payment of the proper amount. It accrues from time to time according to the wants and exigencies of the person claiming to be maintained.[9]

This withholding may be proved otherwise than by a claim

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[1] *Raghubans Kunwar* v. *Bhagwant Kunwar* (1899), 21 All. 183.

[2] *Rangubai* v. *Subaji Ramchandra* (1912) 36 Bom. 383 ; 17 Bom. L. R. 267.

[3] See *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at pp. 497, 498 ; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108, at p. 110.

[4] *Oomrao Singh* v. *Man Konwer* (*Musst.*) (1867), 2 Agra. 136. As to her right to remain in possession, see *ante*, pp. 93, 94.

[5] IV. of 1882, ss. 58, 88, 100.

[6] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73, as explained in *Nistarini Dasi* (*S. M.*) v. *Makhanlal Dutt* (1872), 9 B. L. R. 11, at p. 27 ; 17 W. R. C. R. 4.

[7] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73, explained in *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 73, and in *Nistarini Dasi* (*S. M.*) v. *Makhanlal Dutt* (1872), 9 B. L. R. 11, at p. 27 ; 17 W. R. C. R. 4.

[8] *Ramchandra Dikshit* v. *Savitribai* (1867), 4 Bom. H. C. A. C. 73.

[9] *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 118 ; 3 Bom. 415, at p. 420 ; 6 C. L. R. 162, at p. 166 ; *Rangubai* v. *Subaji Ramchandra* (1912), 36 Bom. 383 ; 14 Bom. L. R. 267.

and refusal.[1] Past non-payment is *primâ facie* evidence of such withholding.[2]

The omission to claim maintenance apart from the effect of the law of limitation will not prejudice the claimant when he is obliged from his wants or exigencies to demand it.[3]

Limitation of suit for arrears of maintenance.

A suit for arrears of maintenance must be brought within twelve years from the time when the arrears are payable.[4]

Thus past maintenance for twelve years,[5] and no more, can be recovered by suit.

Limitation of suit for declaration.

A suit for a declaration of a right to maintenance must be brought within twelve years from the time when the right is denied.[6]

Apparently when the right has been denied, and twelve years has elapsed from such denial, the right to maintenance is barred.[7]

Fixing of amount.

Where the parties do not agree, it is for the Court to fix the rate of maintenance payable.[8]

As to the principles upon which maintenance should be fixed, see *ante*, p. 87.

The Judicial Committee will not interfere with the exercise of the discretion by the Courts in India in fixing maintenance, except where strong grounds exist.[9]

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[1] *Mallikarjuna Prasada Naidu* v. *Durga Prasada Naidu* (1894), 17 Mad. 362; S. C. on appeal (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74; 2 Bom. L. R. 945; *Seshamma* v. *Subbarayadu* (1893), 18 Mad. 403; *Motilal Prannath* v. *Kashi (Bai)* (1892), 17 Bom. 45; *Parvatibai* v. *Chatru* (1911), 36 Bom. 131; 13 Bom. L. R. 1023. See *Narayanrao Ramchandra Pant* v. *Ramabai* (1879), 6 I. A. 114, at p. 119; 3 Bom. 415, at p. 421.

[2] *Mallikarjuna Prasada Nayudu (Raja Yarlagadda)* v. *Durga Prasada Nayudu (Raja Yarlagadda)* (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74; 2 Bom. L. R. 945.

[3] *Siddessury Dossee* v. *Janardan Sarkar* (1902), 29 Calc. 557, at p. 572; 6 C. W. N. 530, at p. 545. See, however, *Abbaku* v. *Ammu Shettati* (1868), 4 Mad. H. C. 137.

[4] Act IX. of 1908, Sch. I., art. 128.

[5] See *Subbramania Mudaliar* v. *Kaliani Ammal* (1873), 7 Mad. H. C. 226; *Venkopadhyaya* v. *Kavari Hengusu* (1864), 2 Mad. H. C. 36.

[6] Act IX. of 1908, Sch. I., arts. 129, 132.

[7] *Chhaganlal* v. *Bapubhai* (1880), 5 Bom. 68. See *Jivi* v. *Ramji* (1879), 3 Bom. 207.

[8] *Nubo Gopal Roy* v. *Amrit Moyee Dossee (Sreemutty)* (1875), 24 W. R. C. R. 428; *Bheeloo (Mussummaut)* v. *Phool Chund* (1824), 3 Ben. Sel. R. 223 (new edition, 298); *Nistarini Dasi (S. M.)* v. *Makhanlal Dutt* (1872), 9 B. L. R. 11, at p. 28.

[9] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 447; 1 B. L. R. P. C. 1, at p. 20; 10 W. R. P. C. 17, at p. 25; *Nittokissoree Dossee (Sreemutty)* v. *Jogendro Nauth Mullick* (1878), 5 I. A. 55, at p. 56; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95; 7 Bom. L. R. 907.

The proper course for a Court in ordering maintenance is to make it a charge upon specific property,[1] or to set apart a sum of money sufficient to yield the required allowance, and, if necessary, sell a part of the estate for that purpose.[2] In some cases the Court might be satisfied with security given by the reversioners. Duty of Court.

The allowance fixed by the Court for maintenance should cover all necessary expenses for maintenance and house rent.[3]

It is better to fix an annual sum, and not a share of the income of the estate.[4]

It has also been held that "in decrees where maintenance is awarded, Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require."[5] Such a course would, it is submitted, invite frequent litigation.

Alteration of order.

The amount of maintenance fixed by a decree may be altered by a decree in a subsequent suit, where the circumstances render an alteration necessary.

Such modification cannot be made in a proceeding in execution of a decree, unless the terms of the decree are such as to permit of such modification.[6]

As to the loss of the right by remarriage, see *post*, pp. 369, 370.

Maintenance may be cancelled if the wife or widow has become unchaste,[7] or where, in the case of a wife, the circumstances have so changed that she should be called upon to return to her husband's house. The rate of maintenance may be diminished when there has been such a change in the circumstances of the wife or widow, or of the husband, or person liable for the maintenance,[8] such change not arising from any fault of his own.[9] Except where provision is made in the decree for that purpose,

[1] *Mansha Devi* v. *Jiwan Mal* (1884), 6 All. 617, at p. 621; *Mahalakshmamma Garu (Sri Maniyam)* v. *Venkataratnamma Garu (Sri Maniyam)* (1882), 6 Mad. 83. See *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229.

[2] See *Mundoodaree Dabee (Sree Moottee)* v. *Joynarain Puckrasee* (1801), F. Macn. Cons. 60; *Seeb Chunder Bose* v. *Gooroopersaud Bose*, F. Macn. Cons. 63.

[3] *Mansha Devi* v. *Jiwan Mal* (1884), 6 All. 617, at p. 620.

[4] *Jhunna* v. *Ramsarup* (1880), 2 All. 777.

[5] *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386, at p. 389; 2 Bom. L. R. 191.

[6] *Ranmalsangji Bhagwatsangji (Maharana Shri)* v. *Kundankuwur (Bai Shri)* (1902), 26 Bom. 707; 4 Bom. L. R. 531. See *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386; *Ramkallee Koer* v. *Court of Wards* (1872), 18 W. R. C. R. 474.

[7] *Kandasami Pillai* v. *Murugammal* (1895), 19 Mad. 6; *Vishnu Shambhog* v. *Manjamma* (1884), 9 Bom. 108, at p. 110. See *ante*, pp. 78, 82.

[8] *Nubo Gopal Roy* v. *Amrit Moyee Dossee (Sreemutty)* (1875), 24 W. R. C. R. 428; *Gopikabai* v. *Dattatraya* (1900), 24 Bom. 386; *Venkanna* v. *Aitamma* (1889), 12 Mad. 183; *Vijaya* v. *Sripathi* (1884), 8 Mad. 94; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 624, at p. 630; *Ruka Bai* v. *Ganda Bai* (1878), 1 All. 594.

[9] In *Ramkallee Koer* v. *Court of Wards* (1872), 18 W. R. C. R. 474, it was held that the proper course is to apply for a review of judgment, but it is submitted that the provisions of the Civil Procedure Code (Act V. of 1908), s. 114, Sched. I., order xlvi. rule 1, do not permit such application.

an order for maintenance cannot be cancelled or diminished in proceedings in execution.[1]

The rate may be increased if the cost of food has become greater or the profits of the estate of the husband have materially increased.[2]

Where the circumstances have changed, the Court can alter the amount of maintenance fixed by an arrangement.[3]

Where the alteration in circumstances had arisen from "the act of God," and not from the fault of the owner, maintenance chargeable on an estate by a will can apparently be reduced.[4]

Execution of decree.

Where a decree directs the payment of future maintenance from time to time, it can be enforced by execution,[5] and for the purposes of limitation the decree is as to each year's annuity to be regarded as speaking on the day upon which from that year it became operative.[6]

A decree which merely declares a right of maintenance is not capable of execution.[7]

A decree declaring a right of maintenance out of property which has been transferred, cannot be executed personally against the transferee after the property has passed from him.[8]

Remedy in Magistrate's Court.

A Hindu wife can also recover maintenance from her husband under the provisions of Chap. XXXVI. of the Criminal Procedure Code.[9] The magistrate's order does not interfere with the jurisdiction of a Civil Court.[10]

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[1] *Ranmalsangji Bhagwatsangji (Maharana Shri)* v. *Kundankuwar (Bai Shri)* (1902), 26 Bom. 307; 4 Bom. L. R. 531.

[2] *Bangaru Ammal* v. *Vijayamachi Reddiar* (1899), 22 Mad. 175; *Sreeram Bhuttacharjee* v. *Puddomokhee Debia* (1868), 9 W. R. C. R. 152; *Sidlingapa* v. *Sidava* (1878), 2 Bom. 624, at p. 630.

[3] *Rajender Nath Roy* v. *Putto Soondery Dassee (S. M. Ranee)* (1879), 5 C. L. R. 18.

[4] See *Grees Chund Roy (Maharajah)* v. *Sumbhoo Chund Roy* (1835), 5 W. R. P. C. 98.

[5] *Ashutosh Banerjee* v. *Lukhimoni Debya* (1891), 19 Calc. 139; *Asad Ali Mollah* v. *Haidar Ali* (1910), 38 Calc. 13.

[6] *Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka* (1887), 12 Bom. 65.

[7] *Venkanna* v. *Aitamma* (1889), 12 Mad. 183.

[8] *Dharam Chand* v. *Janki* (1883), 5 All. 389.

[9] Act V. of 1898.

[10] *Deraje Malinga Naika* v. *Marati Kaveri* (1907), 30 Mad. 400. A suit will not lie to restrain such proceedings. *Ibid.*

CHAPTER III.

RELATIONSHIP OF PARENT AND CHILD, AND ADOPTION.

What are legitimate children.

THE only children now recognized by the general Hindu law as legitimate, are those who are born during the existence of a lawful marriage between their parents,[1] and also sons who have been adopted according to the *dattaka* form.[2]

Presumption as to legitimacy.

"The legal presumption in favour of a child born in his father's house of a mother lodged and apparently treated as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made, and the opposing case should be put to strict proof." [3]

As to customs of legitimising children by subsequent marriage, see *Chuckrodhuj Thakoor* v. *Beer Chunder Joobraj* (1864), 1 W. R. C. R. 194; *Chinnammal* v. *Varadarajulu* (1891), 15 Mad. 307.

Illegitimate children.

Children born out of wedlock, although illegitimate, have rights of maintenance,[4] and, if they are not members of one of the three regenerate classes, illegitimate sons of Sudras possess rights of inheritance under the Mitakshara law.[5]

In the country subject to the Mithila school of law, a son may be adopted according to the *Kritrima* form.[6]

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[1] *Pedda Amani* v. *Zemindar of Marungapuri* (1874), 1 I. A. 282, at pp. 292, 293; 14 B. L. R. 115, at pp. 122, 123. See Act I. of 1872, s. 112, which under the guise of a rule of evidence has practically the effect of declaring the law. *Tirlok Nath Shukul* v. *Lachmin Kunwari (Musammat)* (1903), 30 I. A. 152; 25 All. 403; 7 C. W. N. 617; *Narendra Nath Pahari* v. *Ram Gobind Pahari* (1901), 29 I. A. 17; 29 Calc. 111; 6 C. W. N. 146. Sir G. D. Banerjee ("Law of Marriage," 3rd ed., pp. 165, 166) contends that the Hindu law only recognizes as legitimate those who are begotten in wedlock, see "Manu," chap. x. para. 166; "Mitakshara," chap. i. s. 11, para. 2; "Vyavahara Mayukha," chap. iv. s. 9, para. 41; Colebrooke's "Digest," vol. iii. p. 160. This is apparently the case, but the system of infant marriage prevents the question arising, except perhaps in the case of widows.

[2] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 96; 7 W. R. P. C. 57, at p. 59; *Thukoo Baee Bhide* v. *Ruma Baee Bhide* (1824), 2 Borr. 446, at p. 456.

[3] *Ramamani Ammal* v. *Kulanthai Natchear* (1871), 14 M. I. A. 346, at pp. 365, 367; 17 W. R. C. R. 1, at p. 7. See *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32.

[4] *Post*, pp. 206, 207.

[5] *Post*, pp. 382, 383.

[6] *Post*, pp. 157–160.

Palaka putra.

There is nothing to prevent a Hindu adopting a son, or even a daughter, in the sense that a son can be adopted by an Englishman, *i.e.* by treating him as a son, and giving or devising property to him, but in that case no rights of inheritance, or of performing religious ceremonies, are created by the so-called adoption. The relationship is purely contractual, and is determinable at the option of either of the contracting parties. A son so taken is called a *palaka putra.*[1]

Sons recognized in ancient times.

In ancient times the Hindu law recognized the following descriptions of sons [2] as legitimate sons, viz. :—

1. *Aurasa,* or legitimate son by a wife.

2. *Kshetraja,* or son born of a wife duly appointed to raise issue for a husband on failure of any begotten by him.[3] This was the son begotten under the practice of *niyoga,*[4] by which a relative was appointed to raise up issue by the wife of a childless husband, or of one deceased without leaving children.[5]

3. *Putrika putra,* or son of an appointed daughter.[6] In ancient times a man could appoint his daughter to raise up issue to him. The practice is obsolete.[7] Sastri Golap Chunder Sarkar, without giving any instances of its application, contends [8] that there is no reason why it should not be now applied.

4. *Kanina,* or son of an unmarried woman.

5. *Gudhaja,* or secretly born son of an adulterous wife.

6. *Paunarbhava,* or son of a twice married woman. This included not only the son of a woman who had gone through the ceremony of marriage, but also the son of a woman who had connection with a man.

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[1] See *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85; 3 B. L. R. P. C. 27; 12 W. R. P. C. 29; *Kalee Chunder Chowdhry* v. *Sheeb Chunder* (1865), 2 W. R. C. R. 281; *Bhimana Gadu* v. *Tayappah,* Mad. Dec. of 1861, p. 124; 1 Norton, L. C. 83; Steele, 184. The equivalent expression in Southern India is apparently *manasuputra,* see *Abhachari* v. *Ramachendrayya* (1863), 1 Mad. H. C. 393, or *abyyamana putrum* (son of affection).

[2] The order in which the several kinds of sons are placed by various authors varies, but necessarily all concur in giving preference to the *aurasa* son.

[3] Wilson's "Glossary," p. 298.

[4] Lit. appointment, a delegated duty or office, Wilson's "Glossary," p. 380.

[5] Wilson's "Glossary," p. 380. This class of son apparently existed in certain places, such as Orissa, by virtue of a local custom. Banerjee's "Law of Marriage," 3rd ed., p. 181; note to *Sutputtee* (*Mussummaut*) v. *Indranund Jha* (1816), 2 Ben. Sel. R. 173 (2nd ed., 221); Macnaghten's "Hindu Law," vol. i. p. 102. This custom seems to be now obsolete, see Sarbadikhari's "Hindu Law of Inheritance," p. 528.

[6] See *Nursingh Narain* v. *Bhuttun Loll,* W. R. 1864, p. 194.

[7] *Venkata Narasimha Appa Row Bahadur* (*Raja*) v. *Venkata Purushothama Jaganadha Gopala Row Bahadur* (*Rajah Surameni*) (1908), 31 Mad. 321; *Rita Kuer* (*Babui*) v. *Paran Mal* (*Babu*) (1916), 1 Patna L. J. 581. See *Jeebnath Singh* (*Thakoor*) v. *Court of Wards* (1875), 2 I. A. 163; 15 B. L. R. 190; 23 W. R. C. R. 309.

[8] "Law of Adoption," 2nd ed., p. 166*a*.

7. *Sahodha*, or son of a pregnant bride.

8. *Nishada*,[1] or son of a member of one of the regenerate castes by a Sudra woman.[2]

9. *Dattaka*, or son given in adoption.

10. *Kritrima*, or son made, *i.e.* where a man without parents accepts a proposal that he should be taken in adoption.

11. *Kritaka*, or son bought.[3]

12. *Apaviddha*, or son forsaken by his parents, and taken in adoption.

13. *Svayandattaka*, or son self-given. The only difference between this son and the *Kritrima* son seems to be that in the former case the offer comes from the adoptee, and in the latter case it comes from the adopter.

Of these the only sons that are not recognized by Hindu law are the *Aurasa* son and the *Dattaka* son. According to the Mithila school a *Kritrima* son can be taken in adoption.[4] Adoption in this form is based upon recent works,[5] and is not referable to the ancient practice of taking *Kritrima* sons.

ADOPTION ACCORDING TO THE DATTAKA FORM.

Definition of adoption.

An adopted son is a person capable of being adopted,[6] who is given by a person competent to give,[7] to a person competent to receive in adoption,[8] and who has been so given and received in the way prescribed by Hindu law.[9]

Necessity for adoption.

The adoption of a son is a matter of religious obligation to a childless Hindu, who has no prospect of procreating male issue,[10] although it may generally happen that adoptions originate "in the ordinary human desire for perpetuation of family properties and names." [11] It is said that

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[1] Lit. outcast.

[2] "*Saudra* is the son of a twice-born by a Sudra wife: the names *Nishada* and *Parasava* are applied to such sons of a Kshatriya and a Brahmana respectively; by some to the latter." Sarkar's "Law of Adoption," p. 23.

[3] See *Yachereddy Chinna Bassavapa* v. *Yachereddy Gowdapa* (1835), 5 W. R. P. C. 114.

[4] *Post*, pp. 157–160.

[5] *Post*, p. 158.

[6] *Post*, pp. 138–149.

[7] *Post*, pp. 134–137.

[8] *Post*, pp. 103–134.

[9] *Post*, pp. 149–155. In *Chiman Lal* v. *Hari Chand* (1913), 40 I. A. 156; 40 Calc. 879; 17 C. W. N. 855; 15 Bom. L. R. 646, the Privy Council upheld a custom among the Agarwal Banias of Zina that an unequivocal declaration followed by treatment of the person (in that case an orphan and a married man) as an adopted son is sufficient to constitute a valid adoption.

[10] See *Sootroogun Sutputty* v. *Sabitra Dye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109; *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548; *Sarodasoondery Dossee* (*S. M.*) v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 249; *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at pp. 425, 426; 7 W. R. P. C. 71; *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295.

[11] See *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*). *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 135; 22 Mad. 398, at p. 414; 21 All. 460, at p. 477; 3 C. W. N. 427, at p. 442; 1 Bom. L. R. 226.

originally the motives for adoption were secular, and that subsequently religious and secular motives were mixed.[1] Among some castes the motive is purely secular.[2]

As to the origin of the practice of adoption, see Sarkar's "Law of Adoption," Lectures I., II. *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283, at p. 284.

Jains.

Except where custom has varied the law, Jains are governed in matters of adoption by the ordinary rules of Hindu law.[3] The *Dattaka* son is the only adopted son recognized by them,[4] but as they do not accept the Hindu doctrine as to the spiritual efficacy of sons, they are influenced only by secular considerations in adopting.[5]

Motive for adoption.

The motive for the adoption does not affect its validity.[6]

The fact that an adoption is made for the purpose of defeating an alienation will not affect its validity.[7]

As to the motives of a widow for an adoption, see *post*, p. 118.

Custom prohibiting adoption.

A family,[8] or caste,[9] custom prohibiting adoption is valid.

The burden of proving such custom lies on the person alleging its existence.[10]

Agreement not to adopt.

An agreement not to adopt would not apparently invalidate an adoption made in breach of it, but so far as property the subject of such agreement is concerned, it might bind the parties to it. It would not, under any circumstances, bind any one except the actual parties to it.[11]

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1 See Sarkar's "Law of Adoption," pp. 25, 42, 113, 142, 143.

2 See *Bhala Nahana* v. *Parbhu Hari* (1877), 2 Bom. 67.

3 *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241. See *Rup Chand* (*Lala*) v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402.

4 See *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319, at p. 321.

5 See *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 263.

6 See *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 635.

7 *Ibid.* See *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, ~~at p. 165~~.

8 *Fanindra Deb Raikat* v. *Rajeswar Das* (1885), 12 I. A. 72; 11 Calc. 463; *Bishnath Singh* (*Rajah*) v. *Ram Churn Mujmoadar*, Ben. S. D. A. 1850, p. 20.

9 See *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1891), 16 Bom. 470; *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716; 5 Bom. L. R. 134.

10 *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716; 5 Bom. L. R. 134.

11 *Surya Rao Bahadur* (*Sri Raja Rao Venkata Mahapati*) v. *Gangadhara Rama Rao Bahadur* (*Sri Raja Rao Venkata Mahapati*) (1886), 13 I. A. 97; 9 Mad. 499. Although this case was governed by the Mitakshara law, and under that law the son of one of the parties had acquired a right to the property by birth, the reason given for the decision that the effect of the terms of the arrangement would be to alter the law of descent would apply equally to a case governed by the Bengal school. See also *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106.

So far as self-acquired property is concerned, or in cases to which the Bengal school of law is applicable, a father might by a valid gift over, in case of a contemplated adoption by his son, put pressure upon such son to prevent or control his adopting, but the adoption would not be invalidated thereby.[1]

The fact that an adoption was made in breach of an agreement to adopt another boy, which was not carried out, does not render the adoption invalid.[2] Breach of agreement.

A girl cannot be given or taken in adoption.[3] Adoption of girl.

Among the Nambudri Brahmins on the west coast of India, there is in force a practice of giving a daughter in what is called *sarvasvadhanam* marriage, in order that the son born of her should be affiliated as the son of the father giving her.[4] He does not inherit in the family of his father so long as other sons exist.[5] Nambudris.

As to the adoption of daughters by dancing-girls, see *post*, pp. 163, 164.

WHO MAY TAKE IN ADOPTION.

A male Hindu who has not a legitimate[6] or validly[7] adopted[8] son, son's son, or son's son's son in existence and capable of inheriting, may take a son in adoption, unless he be mentally incapable of understanding the nature of the act.[9] Who may adopt.

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[1] See *Hurrosoondery (Ranee)* v. *Kistonauth Roy (Cowar)* (1841), Fulton, 393.

[2] *Siliamedoo Runga Reddy* v. *Achummal* (1808), 2 Strange H. L. 115.

[3] *Gangabai* v. *Anant* (1888), 13 Bom. 690; *Nursingh Narain* v. *Bhuttun Loll*, W. R. 1864, p. 194, commenting (at p. 196) on *Nowab Rai* v. *Bugawuttee Koowar* (1835), 6 Ben. Sel. R. 5 (2nd ed., p. 4); "Vyavahara Mayukha," chap. iv. s. 5, para. 1; W. Macnaghten's "Hindu Law," vol. i. p. 102; Colebrooke's "Digest," vol. iii. p. 493. Nanda Pandita ("Dattaka Mimansa," s. 7, paras. 1, 16, 17, 18–39) argues that daughters can be affiliated, but, as pointed out in Sarkar's "Law of Adoption," pp. 144, 145, his views have not been accepted by Hindus.

[4] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 162, 163.

[5] *Kumaran* v. *Narayanan* (1886), 9 Mad. 260.

[6] *Joy Chundro Raee* v. *Bhyrub Chundro Raee*, Ben. S. D. A. 1849, p. 461; *Rango Balaji* v. *Mudiyeppa* (1898), 23 Bom. 296, at p. 303; *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 311; 2 Bom. L. R. 1101; "Dattaka Mimansa," s. 1, para. 13; "Dattaka Chandrika," s. 1, para. 6.

[7] An invalid adoption cannot influence the validity of a subsequent adoption, which would otherwise be legal, Sarkar's "Law of Adoption," p. 189.

[8] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 102; 7 W. R. P. C. 57, at p. 61; *Ramabai* v. *Raya* (1896), 22 Bom. 482; *Gopee Lall* v. *Chundraolee Buhoojee (Mussamat Sree)* (1872), I. A. Sup. vol. 131; 11 B. L. R. 391; 19 W. R. C. R. 12; *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (1892), 20 I. A. 30; 20 Calc. 487; *Sudanund Mohaputtur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205.

[9] Strange's "Hindu Law," vol. i. p. 78; W. Macnaghten's "Hindu Law," vol. ii. p. 200; "Dattaka Mimansa," s. 1, paras. 13, 14; "Dattaka Chandrika," s. 1, para. 6; Colebrooke's "Digest," vol. iii. pp. 295 *et seq.*

The existence of any other descendant is not a bar to an adoption.[1]

Apparently a Hindu who has given his only son in adoption can adopt a son.[2]

Pregnancy of wife.

It is immaterial whether the adoptive father be hopeless of issue or not. The pregnancy of his wife does not, whether he be, or be not, ignorant of it, prevent a Hindu from adopting,[3] and the adoption is not invalidated by the child of which the wife of the adopter is pregnant at the time of the adoption turning out to be a male.[4]

Incapacity of son.

If the son be permanently incapable of performing religious rites by reason of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy, or from any other reason, which involves an incapacity to inherit,[5] he may be treated for this purpose as non-existent.[6]

Where son has renounced worldly affairs.

There is authority that when a son absolutely renounces the world and all property, and enters a religious order, as by becoming a *sannyasi*, ascetic, or *fakir*, his existence is not an impediment to an adoption by his father.[7]

It has been suggested [8] that this question may be affected by Act XXI. of 1850, but it is submitted that there is not in this case a question of a "forfeiture of rights or property," or impairing or affecting any right of inheritance "by reason of his renouncing, or having been excluded from the communion of any religion, or being deprived of caste."

Loss of caste, etc.

Where a son, natural or adopted, became an outcast, or renounced the Hindu religion, the Hindu law [9] permitted an

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1 W. Macnaghten's "Hindu Law," vol. i. p. 66, note.

2 See *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)*, *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 142; 22 Mad. 398, at p. 421; 21 All. 460, at p. 485; 3 C. W. N. 427, at p. 447; 1 Bom. L. R. 226.

3 *Nagabhushanam* v. *Seshammagaru* (1881), 3 Mad. 180; *Daulut Ram* v. *Ram Lal* (1907), 29 All. 310.

4 *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105. As to the effect of the birth of a son after an adoption, see *post*, p. 187.

5 *Post*, pp. 370–372.

6 Strange's "Hindu Law," vol. i. p. 77; Sarkar's "Law of Adoption," p. 196; Sutherland's "Synopsis," p. 212; W. Macnaghten's "Hindu Law," vol. i. p. 66, note; Rattigan on Adoption, p. 10.

7 Punjab Records, 1875, p. 144. This does not apply to modern Byragees who are not ascetics, *Teeluk Chunder* v. *Shàma Churn Prokash* (1864), 1 W. R. C. R. 209; *Jagannath Pal* v. *Bidyanund* (1868), 1 B. L. R. A. C. 114; 10 W. R. C. R. 172; *Khoodeeram Chatterjee* v. *Rookhinee Boistobee* (1871), 15 W. R. C. R. 197.

8 Sarkar's "Law of Adoption," p. 196.

9 Sutherland's "Synopsis" (Stokes' edition), p. 664; W. Macnaghten's "Hindu Law," vol. ii. p. 200, note; Steele, 42, 181; Strange's "Hindu Law," vol. i. p. 77.

adoption, but the effect of Act XXI. of 1850 is to prevent the natural or previously adopted son from being ousted from any of his legal rights.[1]

When the question as to the validity of such an adoption shall arise, it may be that "the Courts would refuse to recognize an adoption which could confer no civil rights." [2] Except in the case of an after-born son, to which different considerations apply, the co-existence of a natural son possessing civil rights as such, and an adopted son, does not seem to be in accordance with Hindu law as laid down by the Courts. The difficulty in adjusting the respective rights would lead to great inconvenience, but, on the other hand, it seems hard upon a father that he should be unable to regain the religious benefits, which are lost to him by the conversion, or degradation of his son.

Mr. Mayne [3] says "that the question might become of importance on the death of the natural son without issue," but the subsequent death of the son would not render the adoption valid.[4]

It is submitted that where a son has disappeared, and has not been heard of for many years, an adoption, if made, is not valid unless, at the time when the adoption is in question, it be proved that such son was dead at the date of the adoption.[5] Missing son.

An adoption, which is invalid on account of there being a living son, is not rendered valid by the death of that son.[6] Death of son.

It has not been decided whether the assent of a natural or adopted son to a subsequent adoption can validate an adoption during the lifetime of such son.[7] It is submitted that although Consent of son.

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[1] As, for instance, where he is a coparcener in a joint family governed by the Mitakshara law. Also he would not lose a right to succeed to collaterals, even if his father had disinherited him.

[2] See Mayne's "Hindu Law," 8th ed., p. 134; Sarkar's "Law of Adoption," p. 197.

[3] "Hindu Law," 8th ed., p. 134.

[4] *Post*, note 6.

[5] See *Rango Balaji* v. *Mudiyeppa* (1898), 23 Bom. 296, at p. 303. Although ss. 107 and 108 of the Indian Evidence Act (I. of 1872) fix rules as to the presumption of death at the time of dispute, there is no presumption as to the time of death, *Dharup Nath* v. *Gobind Saran* (1886), 8 All. 614, at p. 620. As to the rules of Hindu law with regard to the presumption of death, see *Janmajay Mazumdar* v. *Keshab Lal Ghose* (1868), 2 B. L. R. A. C. 134; *Guru Das Nag* v. *Matilal Nag* (1870), 6 B. L. R. App. 16; 14 W. R. C. R. 468; *Parmeshar Rai* v. *Bisheshar Singh* (1875), 1 All. 53; *Dharup Nath* v. *Gobind Saran* (1886), 8 All. 614; *Dhondo Bhikaji* v. *Ganesh Bhikaji* (1886), 11 Bom. 433; and Sarkar's "Law of Adoption," pp. 194, 195.

[6] *Basoo Camummah* v. *Basoo Chinna Vencatasa*, Mad. S. D. A. 1856, p. 20; Norton L. C., vol. i. p. 78; *Veraprashyia* v. *Santauraja*, Mad. S. D. A. 1860, p. 168; Norton L. C., vol. i. p. 78. This is disputed in Sarkar's "Law of Adoption," p. 190, but it seems clear that an adoption, which was, at the time it was made, invalid, cannot be rendered valid by a subsequent event, see *post*. p. 156.

[7] "Dattaka Mimansa," s. 1, para. 12, in explanation of the Vedik story

a consenting son may be estopped from disputing the adoption, the status of an adopted son with its legal effects of inheritance, etc., cannot be conferred by such consent.

It is clear that it can only do so when such assent is completely free, and is given with a full knowledge of the circumstances.[1]

In the "Dattaka Mimansa"[2] it is said that a second son may be adopted[3] with the sanction of the existing issue, and in *Rungama* v. *Atchama*[4] this seems to have been accepted, although it became unnecessary to decide the question, but the Courts have not in any subsequent case upheld such adoption.

It is submitted that consent to the adoption would not prevent a son from disputing it,[5] except where his conduct had amounted to an estoppel.[6] Otherwise it would be difficult to adjust the respective rights of the legitimate and adopted son,[7] except where an arrangement had been arrived at with regard to them. Sastri G. C. Sarkar[8] treats the judgment in *Rungama* v. *Atchama*[9] as deciding that the consent of the son could render the adoption valid; but it has, it is submitted, no such effect.

Bachelor or widower.

The fact that a man is a bachelor[10] or a widower[11] does not prevent him from taking a son in adoption.

Adoption by minor.

Provided that he has attained the age of discretion, a minor[12] is not incapacitated, as such, from taking a son in adoption, or giving permission to adopt.[13]

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of Sunahsepha Devarata's adoption by Visvamitra, who was already the father of a hundred sons, and whose adoption of another son was ratified by the fifty younger sons. "Vasistha," xvii. 33–35. Sarkar's "Law of Adoption," pp. 180, 181.

[1] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at pp. 102, 103; 7 W. R. (P. C.) 57, at pp. 61, 62; *Sudanund Mohapattur* v. *Bonomallee* (1863), Marsh 317, at pp. 321, 322; 2 Hay, 205.

[2] S. 1, para. 12.

[3] See *ante*, p. 103.

[4] (1846), 4 M. I. A. 1, at pp. 97, 103; 7 W. R. P. C. 57, at pp. 59, 62.

[5] See *post*, p. 156.

[6] *Post*, pp. 172, 173.

[7] See *post*, p. 187.

[8] "Law of Adoption," p. 180.

[9] (1846), 4 M. I. A. 1, at p. 103; 7 W. R. (P. C.) 57, at p. 62.

[10] *Gopal Anant* v. *Narayan Ganesh* (1888), 12 Bom. 329. See *N. Chandrasekharudu* v. *N. Bramhanna* (1869), 4 Mad. H. C. 270, and *Gunnapa Deshpandee* v. *Sunkapa* (1839), Bom. Sel. R. 202; *Monemothonath Dey* v. *Onouthnauth Dey* (1865), 2 Ind. Jur. (N. S.) 24, at p. 43.

[11] *Nagappa Udapa* v. *Subba Sastry* (1865), 2 Mad. H. C. 367; *N. Chandrasekharudu* v. *N. Bramhanna* (1869), 4 Mad. H. C. 270; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328, at p. 352; *Monemothonath Dey* v. *Ononthnauth Dey* (1865), 2 Ind. Jur. (N. S.) 24, at p. 43; *Gunnappa Deshpandee* v. *Sunkappa* (1839), Bom. Sel. Rep. 202.

[12] The Indian Majority Act (IX. of 1875) does not affect the capacity to adopt, s. 2.

[13] *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548, approved of in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at pp. 83, 84; 1 Calc. 289, at pp. 295, 296; 25 W. R. C. R. 235, at p. 239; *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565.

There does not appear to be any case in the Reports in which there has been an adoption by a Hindu who has not attained the age of majority according to Hindu law.

The cases on the subject deal with the capacity to give permission to adopt, but the reasons given in those cases would apply as much to the capacity to receive in adoption as to the capacity to give permission to adopt. These cases refer to the "age of discretion," which apparently means the age at which a Hindu is competent to perform religious ceremonies,[1] but that age does not appear to be fixed.

Of the cases which are cited as authorities for the above proposition, in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani*,[2] the person giving the power had attained the age of majority according to the law to which he is subject[3]; in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*[4] it was held that permission could be given by a person who was within two months of arriving at the age of majority; and in *Rajendro Narain Lahoree* v. *Saroda Soonduree Debia*[5] the report does not specify the age, but the boy had apparently not completed his fifteenth year, as he was described as a minor.

In considering this question it may be remembered that a minor governed by the Mitakshara school would by adoption be acting to his temporal disadvantage, as he would thereby introduce a new coparcener into the family.[6]

It may be that the age depends upon individual capacity, but such a conclusion would, if possible, be avoided, as it would make the title of the adopted son depend upon an uncertain foundation.

Sastri G. C. Sarkar argues that an adoption by a minor is inconsistent with Hindu ideas.[7] He points out that no case of adoption by a minor has as yet arisen.[8] It is very unlikely that the question as to an adoption by a minor would arise. His capacity to give a power of adoption may stand on a different footing, as such power would be for his spiritual benefit, and may become necessary when he is on his deathbed.[9]

In a case governed by the Maharashtra school there seems no reason why the authority of the husband should not be implied, whatever was his age at the time of his death,[10] and in a case governed by the Dravida school the authority of the *sapindas* to authorize an adoption would not apparently be affected by the age of the husband at the time of his death.

Hindu Wills Act.

The Hindu Wills Act[11] provides rules for the execution of wills to which the Act is applicable, and in such cases prevents a minor from disposing of his property by will,[12] but as section 3 of the Act declares that nothing

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1 *Rajendro Narain Lahoree* v. *Saroda Soonduree Debia* (1871), 15 W. R. C. R. 548.

2 (1876), 3 I. A. 72; 1 Calc. 289; 25 W. R. C. R. 235.

3 This case was governed by the Bengal School of Law.

4 (1890), 15 Bom. 565, at p. 576.

5 (1871), 15 W. R. C. R. 548.

6 As to the religious advantage, see *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548, and *ante*, pp. 101, 102.

7 "Law of Adoption," 2nd ed., pp. 207–212.

8 P. 212.

9 See Sarkar's "Law of Adoption," 2nd ed., p. 215*a*.

10 See *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 576.

11 XXI. of 1870.

12 S. 46 of Act X. of 1865 applied by s. 2 of Act XXI. of 1870 to such Hindu wills as are affected by the latter Act.

therein contained shall affect any law of adoption, the question as to the capacity of a minor to give authority to adopt is apparently untouched by that Act.[1]

Non-testamentary permission.

It seems now to be impossible for a minor, who is under eighteen years of age, to execute a valid non-testamentary document conferring an authority to adopt, as a registering officer is required to refuse to register a document executed by a person who appears to him to be a minor.[2] The Legislature has not provided for the case of a verbal permission given by a minor.

Adoption by two persons.

Two persons, even if they are brothers, cannot take the same person in adoption, either at the same time [3] or at different times.[4]

Two co-widows cannot, except perhaps in Western India,[5] take a boy in adoption so as to put them both into the position of adoptive mother.[6]

Ward of Bengal Court of Wards.

No adoption by a ward of the Bengal Court of Wards, or of the Court of Wards of Behar and Orissa,[7] and no written or verbal permission to adopt given by any ward is valid without the consent of the Lieutenant-Governor, obtained either previously or subsequently to such adoption, or to the giving of such permission on application made to him through the Court of Wards.[8]

Even if the necessary consent be given, a ward of a Court of Wards cannot adopt or give permission to adopt unless he be otherwise competent to do so.[9]

Madras Court of Wards.

A ward of the Madras Court of Wards cannot adopt or

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[1] Sastri G. C. Sarkar is of a different opinion ("Law of Adoption," p. 236), but if his view is correct, it follows, as he points out, "that an authority to adopt given by a minor to be valid must be given in words and not in writing."

[2] Act XVI. of 1908, s. 35. An opinion to the contrary effect seems to have been given by the Legal Remembrancer of Bengal (see 12 C. W. N. cxxxviii.), but it is submitted that the words of the Act are clear. See s. 17.

[3] *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at pp. 696, 697. W. Macnaghten's "Hindu Law," vol. i. p. 77. Mayne's "Hindu Law," 8th ed., pp. 192, 193. "The Hindu law is . . . silent upon the point and contains no rule one way or the other," Sarkar's "Law of Adoption," p. 306.

[4] *Post*, p. 148.

[5] *Indar Kunwar (Maharani)* v. *Jaipal Kunwar (Maharani)* (1888), 15 I. A. 127, at pp. 144, 145; 15 Calc. 725, at pp. 746, 747.

[6] *Venkata Narasimha Appa Row Bahadur (Sri Raja)* v. *Parthasarathy Appa Row Bahadur (Sri Raja)* (1913), 41 I. A. 51, at p. 69; 37 Mad. 199, at p. 220; 18 C. W. N. 554, at p. 563; 16 Bom. L. R. 328, at p. 337; *Sarada Prosad Pal* v. *Rama Pati Pal* (1912), 17 C. W. N. 319, at p. 322.

[7] Act IX. (B. C.) of 1879, s. 61.

[8] Act VII. of 1912, s. 5, read with Act IX. (B. C.) of 1879, s. 61.

[9] For example, he cannot adopt unless he has arrived at the age of discretion, *ante*, pp. 106, 107.

give a written or verbal permission to adopt without the consent of the Court of Wards.[1]

Ward of Court of Wards of Central Provinces.

No adoption by a ward of the Court of Wards of the Central Provinces, and no written or verbal permission to adopt given by such ward, is valid without the consent of the Chief Commissioner, obtained either previously or subsequently to the adoption, or to the giving of the permission, on application made to him through the Court of Wards.[2]

Ward of Court of Wards of United Provinces.

A ward of the Court of Wards of the United Provinces cannot adopt without the consent in writing of the Court of Wards, provided that the Court of Wards shall not withhold its consent if the adoption is not contrary to the personal or special law applicable to the ward, and does not appear likely to cause pecuniary embarrassment to the property, or to lower the influence or respectability of the family in public estimation. This restriction has no application to a proprietor who has applied to have his property placed under the superintendence of the Court of Wards.[3]

Punjab.

In the Punjab no ward can, without previous sanction in writing of the Court of Wards, adopt or give permission to adopt.[4]

Courts of Wards in Bombay and Ajmere.

There is no provision with regard to adoption in the Acts relating to Courts of Wards in Bombay [5] and Ajmere.[6]

Right of person disqualified from inheritance.

It is submitted that, at any rate in the case of Sudras,[7] a person who is disqualified from inheriting by reason of a personal disability, such as congenital blindness, impotence, or lameness,[8] can nevertheless take a son in adoption.[9]

Sastri G. C. Sarkar [10] says that Colebrooke's English translation of a passage [11] in the "Mitakshara" is the only authority for denying to persons excluded from inheritance the right to adopt, and he gives a translation

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[1] Act I. (M. C.) of 1902, s. 34 (*c*). As to the law before the passing of that Act, see Mad. Reg. V. of 1804, s. 25, which only deals with adoption by a ward. See *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 83; 1 Calc. 289, at p. 295; 25 W. R. C. R. 235, at p. 239.

[2] Act XVII. of 1885, s. 24.

[3] Act IV. (U. P.) of 1912, s. 37.

[4] Act II. (Punj. C.) of 1903, s. 15.

[5] Act I. (Bo. C.) of 1905.

[6] Reg. I. of 1888.

[7] In their case no religious ceremonies are necessary, *post*, p. 153.

[8] *Post*, pp. 370-372.

[9] See Mayne's "Hindu Law," 8th ed., pp. 135–137; Sarkar's "Law of Adoption," pp. 202, 203, 419; "Punjab Customary Law," vol. ii. p. 154.

[10] Sarkar's "Law of Adoption," p. 202.

[11] Chap. ii. s. 10, para. 11.

which has not such effect. The "Dattaka Chandrika" recognizes the right,[1] and the same view was taken by Sutherland.[2]

Change of religion and degradation.

Change of religion, or degradation from caste, does not *per se* interfere with the capacity to take in adoption.[3]

Where a man not only renounces Hinduism, but also adopts another system of religion with a personal law attached to it, such as Mohammedanism, he loses a right which is alien to the system adopted by him.[4]

It is difficult to see how a Hindu who has become a Christian can take a dattaka son. The boy would not inherit, as the Indian Succession Act (X. of 1865) does not provide for an adopted son. Moreover, the religious elements of the adoption would be wanting. Clearly a twice-born Hindu cannot adopt after becoming a Christian, as he would be incapable of performing the necessary religious ceremonies.

Impurity arising from bodily state.

In the case of members of the twice-born classes, a person suffering from virulent leprosy, and possibly one suffering from any other incurable disease,[5] would apparently be incompetent to take in adoption,[6] at any rate until he had performed expiation according to the Shastras.[7] In less serious cases of leprosy, it seems clear that there is no objection to adoption, at any rate after expiation.[8] In the case of Sudras, leprosy can be no disqualification for taking in adoption.[9]

Ceremonial impurity.

In the case of Sudras, as no religious ceremonies are necessary,[10] an adoption by a person who is in a state of ceremonial impurity from the death or birth of a relation is not on that account invalid.[11]

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[1] S. 6, paras. 1–2. According to the "Dattaka Chandrika" (s. 6, para. 1), the son has a right of maintenance. This is disputed by G. C. Sarkar, "Law of Adoption," p. 419.

[2] "Synopsis," 664, 671. See W. Macnaghten, i. p. 66, note.

[3] Act XXI. of 1850.

[4] *Machbai (Bai)* v. *Hirbai (Bai)* (1911), 35 Bom. 264. See *ante*, p. 23.

[5] "Dayabhaga," chap. v. paras. 7, 10–13. It would, however, be unlikely that Courts would extend the grounds for exclusion from inheritance beyond the decided cases.

[6] See Sarkar's "Law of Adoption," p. 206. In *Bhagaban Ramanuj Das (Mohunt)* v. *Roghunundun Ramanuj Das (Mohunt)* (1895), 22 I. A. 94, at p. 105, 22 Calc. 843, at p. 858, the Judicial Committee say, "In order to disqualify from making an adoption the leprosy must be of a virulent form." Their lordships in that case were dealing with an appointment by a mohunt of a chela to succeed him, and not with an adoption in the ordinary sense. In the Courts below it seems to have been assumed that incurable leprosy would prevent such appointment.

[7] See *Bhoobunessuree Debia* v. *Gourree Doss Turkopunchanun* (1869), 11 W. R. C. R. 535; 2 W. Macn. 201, 202. As to the power to delegate the performance of ceremonies, see cases, *post*, p. 155.

[8] W. Macnaghten's "Hindu Law," vol. ii. pp. 102, 202.

[9] *Sukumari Bewa* v. *Ananta Malia* (1900), 28 Calc. 168.

[10] *Post*, p. 153.

[11] *Thangathanni* v. *Ramu Mudali* (1882), 5 Mad. 358; *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1916), 20 C. W. N. 901.

It is not settled whether among the twice-born classes a person can adopt when he is in a state of impurity arising from the death or birth of a relation,[1] and has not performed the necessary expiation.

This question is not one of great importance, as a person in a state of impurity would be unlikely himself to perform ceremonies which would be of no religious efficacy. He is apparently competent to perform such ceremonies vicariously,[2] and if they are performed the Court will uphold the adoption.[3] There seems no doubt that ceremonial impurity can be removed by expiation. The Courts would probably be disinclined to give effect to a disability which can be cured by expiation.[4]

In *Lakshmibai* v. *Ramchandra* [5] it was said, "There is thus admittedly no authoritative Smriti text on the point, and whatever the efficacy of ceremonial strictness may be, the Courts which administer the law in British India must be guided by what is the received practice and custom of the country or the class to which the parties belong."

The fact that the adoptive father is ceremonially impure does not prevent his receiving in adoption, and he can postpone the religious ceremonies until the pollution has been removed.[6]

It has been held that a professed ascetic cannot take in adoption.[7] Adoption by ascetic.

Although the Hindu codes did not contemplate an adoption by a person who had renounced the world for the sake of religion, there seems now, having regard to the provisions of Act XXI. of 1850, nothing to prevent a person from emancipating himself from a religious order and taking a son in adoption.[8]

A husband does not require the assent of his wife to his taking a son in adoption. He may adopt in spite of her express Assent of wife unnecessary.

[1] In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. P. C. 25, it was assumed that a person who at the time of the adoption was impure in consequence of the death of a relative could not adopt. See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, where the question was as to the adopting widow's power to adopt. Strange's "Manual," 63, 2nd ed., p. 18.

[2] Sarkar's "Law of Adoption," p. 213. See *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Vijiarangam* v. *Lakshman* (1871), 8 Bom. H. C. R. O. C. 244.

[3] *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 395.

[4] *Post*, p. 372.

[5] (1896), 22 Bom. 590, at p. 595.

[6] *Santappayya* v. *Rangappayya* (1894), 18 Mad. 397, at pp. 398, 399; *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1916), 20 C.W.N. 901. See Sarkar's "Law of Adoption," 2nd ed., p. 215*b*.

[7] "Punjab Records," 1874, p. 83.

[8] In *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi., it was held that there is nothing in the Hindu law books to show that a Vaisya who has undergone the ceremony of *Vibhut Vida* (a ceremony indicating renunciation of worldly affairs, analogous to "retirement to a forest," in ancient law, Sarkar's "Law of Adoption," p. 201) is incapable of adopting a son.

dissent.[1] A wife may, however, join in an adoption by her husband.

There is said to be a practice in Bengal by which a man adopts a son in conjunction with more than one wife.[2] One wife only can receive a boy in adoption so as to step into the position of being his adoptive mother.[3]

Adoption by woman.

A woman cannot take a child to herself in adoption.[4]

If she goes through the form of doing so, the boy acquires no rights thereby, either in her property or in that of her husband.

A woman can, if she is governed by the Mithila school of law, take to herself a son according to the *Kritrima* form of adoption.[5]

As to adoption of daughters by dancing girls and prostitutes, see *post*, pp. 163, 164.

Permission to Wife or Widow to Adopt.

Permission to wife to adopt.

A Hindu, who is capable of taking a son in adoption, can give to his wife power to adopt a son, or sons in succession,[6] to him, to be exercised either during his lifetime,[7] or (except he be governed by the Mithila school of law [8]) after his death.[9]

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[1] See *Alank Manjari* v. *Fakir Chand Sarkar* (1834), 5 Ben. Sel. R. 356 (new edition, 418); "Dattaka Mimansa," s. 1, para. 22.

[2] See Sarkar's "Law of Adoption," pp. 183, 184.

[3] *Venkata Narasimha Appa Row Bahadur* (*Sri Raja*) v. *Parthasarathy Appa Row Bahadur* (*Sri Raja*) (1913), 41 I. A. 51, at p. 69; 37 Mad. 199, at p. 233; 18 C. W. N. 554, at p. 563; 16 Bom. L. R. 328, at p. 337; *Sarada Prosad Pal* v. *Rama Pati Pal* (1912), 17 C. W. N. 319, at p. 322. See *post*, p. 182.

[4] *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. (P. C.) 1; *Narendra Nath Bairagi* v. *Dina Nath Das* (1909), 36 Calc. 824. In *Peria Ammani* v. *Krishnasami* (1892), 16 Mad. 182, at p. 194. Best, J., expressed the opinion that a Jain widow who succeeded absolutely to her husband's property, could adopt a son to herself, but such expression of opinion was unnecessary for the decision of the case. An interesting discussion as to the capacity of women to adopt is to be found in Sarkar's "Law of Adoption," pp. 216–226.

[5] *Post*, pp. 157–159.

[6] *Sham Chunder* v. *Narayni Dibeh* (1807), 1 Ben. Sel. R. 209 (new edition, 279). For other instances, see *Jumoona Dassya Chowdhrani* v. *Bamasundari Dassya Chowdhrani* (1876), 3 I. A. 72; 1 Calc. 289; *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279; 3 W. R. P. C. 15; *Ram Soondur Singh* v. *Surbanee Dossee* (1874), 22 W. R. C. R. 121. As to whether in the absence of a special power sons can be adopted in succession, see *post*, p. 129.

[7] She cannot adopt a son to him during his lifetime without his authority. *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153.

[8] *Post*, p. 126.

[9] *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. P. C. 1; *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi*

"A man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime."[1]

Existence of son, etc.

The existence of a son, grandson, or great-grandson, who is not permanently incapacited from performing religious rites,[2] does not of itself invalidate a power, but it prevents the exercise of the power, which remains in suspense.[3]

Permission given by person disqualified from adopting.

It is said that when a person is by reason of impurity arising from his bodily state, such as from virulent leprosy, disqualified from adopting,[4] he can nevertheless give to his widow a permission to adopt.[5]

Adoption only by adoptive father or mother.

Under no circumstances can a son be adopted by any one except the man to whom he is adopted, or his widow.[6]

Wife alone can be donee of power.

Power to adopt can be given to the wife alone, and to no one else.[7] The inclusion of other persons in the power vitiates it [8]; but the donor of the power may express his desire that in the exercise of the power the wife should consult any named person,[9] and he may make the exercise of the power contingent upon the consent of other persons.[10]

It is not clear whether a power to two widows to adopt jointly is good,[11] but it is possible in Western India.[12]

Narasayya (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371; and cases, *post*, pp. 118, 119.

[1] *Gopee Lall* v. *Chundraolee Buhoojee* (*Mussamat Sree*) (1872), I. A. Sup. Vol. 131, at p. 133; 11 B. L. R. 391, at p. 394; 19 W. R. C. R. 12, at p. 13.

[2] *Ante*, p. 104.

[3] *Post*, pp. 132, 133.

[4] See *ante*, p. 110.

[5] Sarkar's "Law of Adoption," p. 206.

[6] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; 2 Bom. L. R. 446; *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590, at p. 593; *Karsandas Natha* v. *Ladkavahu* (1887), 12 Bom. 185, at p. 199; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 257; Strange's "Hindu Law," vol. ii. pp. 93, 94. More than one widow cannot adopt at the same time, *ante*, p. 108.

[7] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; 2 Bom. L. R. 446; *Karsandas Natha* v. *Ladkavahu* (1887), 12 Bom. 185, at p. 199; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241.

[8] *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549; 2 Bom. L. R. 446.

[9] See *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), Calc. 385.

[10] *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225. See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 135; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (*Shri*) (1915), 42 I. A. 135; 39 Bom. 441; 19 C. W. N. 729; 17 Bom. L. R. 527.

[11] *Barada Prosad Pal* v. *Rama Pati Pal* (1912), 17 C. W. N. 319, at p. 322; *Venkata Narasimha Appa Row Bahadur* (*Sri Raja*) v. *Parthasarathy Appa Row Bahadur* (*Sri Raja*) (1913), 41 I. A. 51, at p. 69; 37 Mad. 199, at p. 223; 18 C. W. N. 554, at p. 563; 16 Bom. L. R. 328, at pp. 337, 338. See *ante*, p. 108.

[12] *Indar Kunwar* (*Maharani*) v. *Jaipal Kunwar* (*Maharani*) (1888), 15 I. A. 127, at pp. 144, 145; 15 Calc. 725, at pp. 746, 747.

Form of authority.

The authority need not be in any particular form. It may be in writing, or (except in a case to which the Oudh Estates Act, 1869,[1] applies) it may be oral.[2]

Hindu Wills Act.

If the authority is contained in a will to which the Hindu Wills Act [3] applies, such will must be executed in accordance with the formalities required by that Act.[4]

Stamp.

Registration.

If the instrument giving the authority is not of a testamentary character, it must, if executed after the 1st January, 1870, be engrossed on a stamped paper of ten rupees,[5] and if executed after the 1st of January, 1872, it must be registered.[6]

In cases to which the Oudh Estates Act, 1869,[1] applies, the power must be in writing,[7] but need not be registered.[8]

Revocation of power.

A power of adoption may be revoked, either expressly or by implication.

An example of a revocation by implication would be where, after giving the power, the man himself takes a son in adoption.[9]

The mere birth of a son would not necessarily imply a revocation, but it might, taken with other circumstances, have such effect.[10]

Hindu Wills Act.

Where the power is contained in a will, to which the Hindu Wills Act [11] applies, it cannot "be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed,[12] or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same." [13]

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[1] I. of 1869.

[2] *Soondur Koomaree Debia* v. *Gudadhur Pershad Tewaree* (1858), 7 M. I. A. 54, at p. 64; 4 W. R. P. C. 116, at p. 119; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371.

[3] XXI. of 1870.

[4] S. 50 of Act X. of 1865, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.

[5] By Act II. of 1899, Sched. I., art. 3, an adoption deed, that is to say, any instrument (other than a will) recording an adoption or conferring or purporting to confer an authority to adopt requires a stamp of ten rupees. There are similar provisions in Act I. of 1879, Sched. I., art. 38, and Act XVIII. of 1869, Sched. II., art. 31.

[6] Act XVI. of 1908, s. 17. As to whether in the absence of registration evidence may be given as to the grant of the power, quære, see *Somasundara Mudaly* v. *Duraisami Mudaliar* (1903), 27 Mad. 30.

[7] S. 22 (8).

[8] *Bhaiya Rabidat Singh* v. *Indar Kunwar* (*Maharani*) (1888), 16 I. A. 53; 16 Calc. 556.

[9] See *Goureepershaud Rai* v. *Jymala* (*Mussummaut*) (1814), 2 Ben. Sel. R. 136 (new edition, p. 174).

[10] See *Gungaram Bhaduree* v. *Kasheekaunt Roy* (1813), 2 Ben. Sel. R. 44 (new edition, p. 56).

[11] XXI. of 1870.

[12] Act X. of 1865, s. 50, applied by Act XXI. of 1870, s. 2, to such wills as are subject to the latter Act.

[13] Act X. of 1865, s. 57, applied to Hindu wills by Act XXI. of 1870, s. 2. It cannot be revoked by another and invalid will which neither expressly nor impliedly revokes it; *Venkatanarayana Pillai* v. *Subbammal* (1915), 43 I. A. 20; 39 Mad. 107; 20 C. W. N. 234; 18 Bom. L. R. 372.

Where the power is contained in a will, which is not subject to the Hindu Wills Act, the revocation can be effected by parol.[1]

When a power to adopt is given to one of several widows, such widow can adopt without reference to the other widow or widows,[2] and she alone can exercise the power.[3]

Several widows.

When power is given to the widows jointly, it cannot be acted upon by one of them singly, even on the death of her co-widow,[4] except perhaps in Western India.[5]

The question as to whether apart from custom a joint power given to several widows is capable of exercise was discussed but not decided in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (1913), 41 I. A. 51; 37 Mad. 199; 18 C. W. N. 554; 16 Bom. L. R. 328. It was pointed out in that case that two women could not bear the same relation as mother to the child.

Where the permission is given to all of the widows severally, the elder widow, and on her refusal the younger widow can adopt.[6]

Where the authority contemplates simultaneous adoptions by the several widows, so that there should be two adopted sons living at the same time, the power is incapable of being exercised at all.[7]

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[1] *Pertab Narain Singh* (*Maharajah*) v. *Subhao Koer* (*Maharanee*) (1877), 4 I. A. 228; 3 Calc. 626; 1 C. L. R. 113. In that case a verbal authority given by a Hindu testator for the destruction of a will, although the will was not in fact destroyed, was held to constitute a revocation of the will.

[2] Colebrooke's remarks in *Chellummal* v. *Munummal* (1803); Strange's "Hindu Law," vol. ii. p. 91.

[3] Mayne's "Hindu Law," 8th ed., p. 149. An authority given to the "*Maharani Sahiba*," to adopt was held to give power to the elder widow alone. *Indar Kunwar* (*Maharani*) v. *Jaipal Kunwar* (*Maharani*) (1888), 15 I. A. 127; 15 Calc. 725.

[4] See *Venkata Narasimha Appa Row Bahadur* v. *Parthasarathy Appa Row Bahadur* (*Sri Rajah*) (1913), 41 I. A. 51; 37 Mad. 199; 18 C. W. N. 554; 16 Bom. L. R. 328; *Sarada Prosad Pal* v. *Rama Pati Pal* (1912), 17 C. W. N. 319, at p. 322. Sir F. Macnaghten, "Considerations," p. 171.

[5] *Indar Kunwar* (*Maharani*) v. *Jaipal Kunwar* (*Maharani*) (1888), 15 I. A. 127, at pp. 144, 145; 15 Calc. 725, at pp. 746, 747.

[6] *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar* (1912), 39 Calc. 582; 16 C. W. N. 440; *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69. In *Luckinarain Tagore's case*, F. Macnaghten's "Considerations," p. 172, Sircar's "Vyavastha Darpana," 2nd ed., 842, the claim of the eldest widow was upheld by the Court. For an instance of a power given to the elder widow to adopt three sons successively and thereafter to the younger widow to adopt, see *Akhoy Chunder Bagchi* v. *Kallapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406.

[7] *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; *Akhoy Chunder Bagchi* v. *Kallapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406, but the Court will, if possible, give to the document a construction which will make a lawful adoption possible.

Permission absolute, contingent, conditional, or restricted.

The permission may be absolute, or its exercise may be contingent upon certain events,[1] or may be subject to lawful conditions, or may be subject to restrictions as to the boy to be adopted, or otherwise.

Contingent on consent of others.

The exercise of the power may be contingent upon the consent of persons named by the husband,[2] and if such consent cannot be obtained the authority cannot be exercised.[3]

A direction to a wife "to adopt a son with the good advice and opinion of the manager," does not make the adoption contingent on the consent of the manager.[4]

Implied condition expressed.

In some cases the contingency which is expressed is one that is implied by the law, as, for instance, a man gives to his wife a power to adopt in case his son dies under age and unmarried.[5]

Condition as to property.

There is authority that where the power of adoption requires as a condition of its being exercised that particular arrangements should be made with regard to the property, as, for instance, that particular property should be devoted to a charity, effect must be given to such condition.[6]

Failure of disposition.

The failure of a disposition as to property in a will does not necessarily affect a power of adoption.[7]

Failure of contingency.

Where the contingency, upon the happening of which the power is to be exercised, does not occur, the power cannot be exercised.

For instance, A, leaving his wife pregnant, makes a will giving her authority to adopt "in case the son to be born shall die." The widow is delivered of a daughter. The power cannot be exercised.[8]

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[1] A condition subsequent, *i.e.* providing that in a certain event the adoption is to become void, would not affect an adoption which has been made.

[2] *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225. See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 135; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551.

[3] See *Beem Churn Sen* v. *Heeraloll Seal* (1867), 2 Ind. Jur. N. S. 225; *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65, at p. 70; *Tarachurn Chatterjee v. Suresh Chunder Mookerji* (1889), 16 I. A. 166, judgment of High Court, at p. 167; *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128, at p. 134; 27 Calc. 996, at p. 1002; 4 C. W. N. 549, at p. 551; 2 Bom. L. R. 446.

[4] *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385.

[5] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at p. 22. See *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392; *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

[6] *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10. As to the power of the adoptive father to restrict the adopted son's rights in ancestral property, see *post*, pp. 184, 185.

[7] *Bachoo Hurkisondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646.

[8] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42. Probably the Court would now give a more liberal construction to a provision of this kind, see *post*, p. 117.

Where the exercise of the power is contingent upon circumstances, which involve an invalid adoption, or is contingent upon illegal, or immoral, or impossible conditions, the power cannot be exercised. Invalid contingency.

In a case where the power was only to be exercised in case of the disagreement of the wife and son, the power was held to be invalid.[1]

A permission to adopt must be strictly construed,[2] but a possible construction which would render the power valid should be preferred.[3] If the permission be acted upon it must be strictly followed.[4] Strict construction.

As to successive adoptions, see *post*, pp. 129, 130.

If the strict exercise of the power would involve an invalid adoption, then no effect can be given to the power, as, for example, where the donor of the power directs the simultaneous adoption of more than one child,[5] or the adoption of a boy during the lifetime of a living son.[6]

Where the husband has specified the boy to be adopted, or the class out of which a boy is to be adopted,[7] his direction must be followed. It is not settled whether if a specified boy be unavailable, another boy can be adopted.[8] Specification of boy.

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[1] *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

[2] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42. This, and other cases, which lay down the rule that powers of adoption are to be strictly construed are criticized in Sarkar's "Law of Adoption," p. 235, where it is advocated that a liberal construction should be given to powers of adoption.

[3] See *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406; *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar* (1912), 39 Calc. 582; 16 C. W. N. 440.

[4] *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at p. 356; 12 W. R. P. C. 1, at p. 2, where their lordships say, "Of course such a power must be strictly pursued." (In the report of the same case in 2 B. L. R. (P. C.) 101, at p. 104, the words are reported as, "Of course such authority must be strictly proved.") See *Amrito Lal Dutt* v. *Surnomoye Dasi* (1900), 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549; 2 Bom. L. R. 446; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371.

[5] *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513. See *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406. S. C. in Court below, *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (1882), 9 Calc. 50; 11 C. L. R. 297; *Choundawalee Bahoojee (Gosaeen Sree)* v. *Girdhareejee* (1868), 3 Agra, 226.

[6] In this case the adoption cannot be made even after the death of the living son. *Joychundro Raee* v. *Bhyrubchundro Raee*, Ben. S. D. A. 1849, p. 461; *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434).

[7] *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65.

[8] *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46; *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65. *Contrâ* opinion of Bengal pundits in *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 78, at p. 98.

In Bombay an authority to adopt a specified boy would not, at any rate in the case of that boy being unavailable, prevent an adoption of another boy, unless the husband has expressly forbidden the adoption of any other boy.[1] In an old case [2] a similar rule was applied in Madras, but in a recent case [3] a different view was entertained. It is submitted that except in a case governed by the Maharashtra school of law, an authority to adopt a specified boy cannot be exercised with respect to any other boy. The above-named school permits an adoption by the widow without the express consent of her husband,[4] and will not imply a prohibition to adopt a boy other than the named boy.

Motive of widow.

Where the adoption is otherwise valid, a discussion as to the motive of the widow for adopting is immaterial.[5]

ADOPTION BY WIDOW.

There is a difference of opinion between the schools as to the power of a widow to adopt a son to her husband.

Origin of differences between schools.

The difference of doctrine of the several schools of law arises from the interpretations put by the schools upon a text of *Vasishta.*[6] As to this, the Judicial Committee said, in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*,[7] "All the schools accept as authoritative the text of *Vasistha*, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to

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[1] See *Lakshmibai* v. *Rajaji* (1897), 22 Bom. 996, approving of the following passage in West and Bühler, vol. ii. p. 965, "It is common for a husband authorizing an adoption to specify the child he wishes to be taken. Should that child die, or be refused by his parents, the authority would still be held, at least, in Bombay, to warrant the adoption of another child, unless, indeed, he had said 'such a child and no other.' The presumption is that he desired an adoption, and by specifying the object merely indicated a preference." See *Ramchandra Baji* v. *Bapu Khandu*, Bom. P. J. 1877, p. 42.

[2] *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 78.

[3] *Amirthayyan* v. *Ketharamayyan* (1890), 14 Mad. 65. See *post*, p. 129.

[4] *Post*, pp. 124, 125.

[5] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 14; 1 Mad. 174, at pp. 190, 191; 26 W. R. C. R. 21, at p. 26; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558 (a decision of a full bench of the Bombay High Court). The following were previously reported decisions on the same question: *Bhimawa* v. *Sangawa* (1896), 22 Bom. 206; *Mahablesvar Fondba* v. *Durgabai* (1896), 22 Bom. 199; *Vithoba* v. *Bapu* (1890), 15 Bom. 110; *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 181.

[6] XV. 1–8; Colebrooke's "Digest," vol. iii. p. 242.

[7] (1868), 12 M. I. A. 397, at pp. 435, 436; 1 B. L. R. P. C. 1, at p. 12; 10 W. R. P. C. 17, at p. 21.

the *Dattaka* form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the *Muyookhu* and *Koosthubha* treatises which govern the *Mahratta* school explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, rather than to the authority to adopt being independent of the husband."

Under the *Bengal* school of law a widow cannot adopt a son without the express permission of her husband.[1] Bengal school.

Where a power of adoption is given to two widows successively the elder would have the preference.[2]

The same rule applies under the *Benares* school of law.[3] Benares school.

It applies even if the deceased husband was a member of a joint undivided family, and his rights had devolved by survivorship upon the other members of the family.[4]

Among the Jains, the right of a childless widow to adopt is generally co-extensive with the right which was possessed by her husband, and does not depend upon his authority, either express or implied.[5] Jains.

Such right, as being derogatory to the ordinary Hindu law, must be specially proved in each case. It has been affirmed in cases of members of the Saraogee Agarwala sect from Meerut,[6] Aligarh,[7] Saharunpur,[8] and

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[1] *Solukhna* (*Mussummaut*) v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434); *Tara Munee Dibia* (*Musst.*) v. *Devnarayun Rai* (1824), 3 Ben. Sel. R. 387 (new edition, 516); *Janki Dibeh* v. *Suda Sheo Rai* (1807), 1 Ben. Sel. R. 197 (new edition, 262); *Kishenkant Goswamee* v. *Purmanund Goswamee* (1810), 2 W. Macn. 175.

[2] *Bijoy Krishna Karmakar* v. *Ranjit Lal Karmakar* (1911), 38 Calc. 694.

[3] *Haimun Chull Sing* (*Raja*) v. *Ghunsheam Sing* (*Koomar*) (1834), 2 Knapp, 203; 5 W. R. P. C. 69. (The decision in this case was limited to the district of Etawah, but it has been accepted as declaratory of the law of the Benares school.) *Chowdhry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350; 2 B. L. R. (P. C.) 101; 12 W. R. P. C. 1; *Tulshi Ram* v. *Behari Lal* (1889), 12 All. 328; *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (*Ranee*) (1816), 2 Ben. Sel. R. 169 (new edition, 216); *Jai Ram Dhami* v. *Musan Dhami* (1830), 5 Ben. Sel. R. 3. See *Parbhu Lal* (*Lala*) v. *Mylne* (1887), 14 Calc. 401, at pp. 415, 416.

[4] See G. C. Sarkar's "Law of Adoption," p. 229.

[5] *Sheo Singh Rai* v. *Dakho* (*Mussumut*) (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193; *Asharfi Kunwar* v. *Rup Chand* (1908), 30 All. 197. See the latter case as to the right of a senior widow to adopt without the concurrence of the junior widow.

[6] *Sheo Singh Rai* v. *Dakho* (*Mussumut*) (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193; *Manohar Lal* v. *Banarsi Das* (1907), 29 All. 495.

[7] *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319.

[8] *Asharfi Kunwar* v. *Rup Chand* (1908), 30 All. 197.

Arrah,[1] and in a case of the Oswal sect from Moorshedabad,[2] and also in an old case from Lower Bengal,[3] in which it does not appear to what sect the parties belonged. In a case in Madras,[4] it was held that the custom was not proved.

Dravida school.

According to the *Dravida* school, a widow can adopt either with her husband's express permission,[5] or, if there be no express or implied prohibition by him, with the assent of her husband's kindred,[6] at or about the time of the adoption.[7]

Prohibition by husband.

"Inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied whenever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites. . . . The same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt when on a new and unforeseen occasion the religious duty arises."[8]

Failure of disposition implying prohibition.

The assent may be withdrawn before the adoption.[9]

Power co-extensive with that of husband.

"In Madras it is established . . . that, unless there is some express prohibition by the husband, the widow's power, at

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[1] *Harnabh Pershad* v. *Mandil Dass* (1899), 27 Calc. 379.

[2] *Manik Chand Golecha* v. *Jagat Settani Prankumari Bibi* (1889), 17 Calc. 518. It was also held in this case that the adoption of orthodox Hinduism does not affect the right.

[3] *Govindnath Ray (Maha Rajah)* v. *Gulal Chand* (1833), 5 Ben. Sel. R. 276 (new edition, 322).

[4] *Peria Ammani* v. *Krishnasami* (1892), 16 Mad. 182.

[5] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at pp. 22, 23; *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291; *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283.

[6] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397; 1 B. L. R. (P. C.) 1; 10 W. R. P. C. 17; *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302; *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202; *Arundadi Ammal* v. *Kuppammal* (1867), 3 Mad. H. C. 283.

[7] A consent previously obtained from a deceased *sapinda* is not sufficient: *Mami* v. *Subbarayar* (1911), 26 Mad. 145.

[8] *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 443, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25.

[9] *Mami* v. *Subbarayar* (1911), 36 Mad. 145, at p. 147.

least with concurrence of *sapindas* in cases where that is required, is co-extensive with that of the husband."[1]

The power to adopt with the assent of the husband's kinsmen applies to every case in which a widow might make an adoption under the express authority of her husband.[2]

Thus she can adopt on the death of a natural son,[3] and she can take successive sons in adoption on the death of sons previously adopted, either with the assent of her husband [4] or of his kinsmen.

Among the *Nambudri Brahmins* in *Malabar* in theory the widow's power is as under the *Dravida* school, but in its application the husband's authority is presumed, unless there is an express prohibition, at any rate when the adopting widow is the surviving member of the *illam*.[5] Nambudri Brahmins.

"Where the husband's family is . . . undivided, . . . the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole-assent to authorize an adoption by her."[6] Consent of what kinsmen sufficient. Joint family.

Where the father is not alive, it was said in the *Ramnad* case[7] that "the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will," but an adoption with the consent of the manager of the joint family, who is acting *bonâ fide*, would apparently be upheld.[8]

In the latter case, and also probably in the case of a consent by the father, as head of the family, such due consideration of the propriety of the adoption would be necessary,[9] as is required in the case where the family is separate.[10]

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1 *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)* (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at pp. 436, 437; 1 Bom. L. R. 226.

2 *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 10; 1 Mad. 174, at p. 187; 26 W. R. C. R. 21, at p. 23.

3 *Ibid.*

4 *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202, at p. 205.

5 *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 179. In this case the widow was the sole surviving member of the *illam*, so the question whether the consent of the other members was required did not arise (see p. 188).

6 *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 441, 442; 1 B. L. R. (P. C.) 1, at p. 16; 10 W. R. P. C. 17, at p. 23.

7 *Ibid.*

8 See *Raghunada (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302; Sarkar's "Law of Adoption," p. 259.

9 See *Karunabdi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at pp. 177, 178, 179; 2 Mad. 270, at pp. 279, 280, 281.

10 *Post*, p. 122.

"Even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of her husband or the assent of her father-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the coparcenary is absolutely necessary." [1] The consent of kinsmen is required on account of the incapacity of women to act rather than to procure the consent of all whose interests will be defeated by the adoption.[2]

Where the joint family consists of several branches, it would seem to be sufficient to obtain the consent of the branch to which the husband belonged.[3]

It is clear that when the family is undivided the requisite authority cannot be sought for outside the family.[4]

Separate.

Where the widow has taken by inheritance the separate estate of her husband, the consent of every kinsman, however remote, is not essential. The consent of the father-in-law would be sufficient.[5] If the father-in-law be dead, "there should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that *sapinda*, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." [6]

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[1] See *Venkatakrishnamma* v. *Annapurnamma* (1899), 23 Mad. 486, at pp. 487, 488.

[2] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 442; 1 B. L. R. (P. C.) 1, at p. 17; 10 W. R. P. C. 17, at p. 23; *Narayanasami Naick* v. *Mangammal* (1905), 28 Mad. 315, at p. 319; *Mami* v. *Subbarayar* (1911), 36 Mad. 145, at p. 147.

[3] Sarkar's "Law of Adoption," p. 259.

[4] *Raghunada (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302, approving of *Ramaswami Iyen* v. *Bhagati Ammal* (1873), 8 Mad. Jur. 58, where it was held by the Sudr Court of Travancore that the assent of certain separate *dayadies* (kinsmen) of the deceased husband was not sufficient to validate an adoption by a widow to which the husband's undivided brother and the head of the undivided family had not assented.

[5] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 442; 1 B. L. R. (P. C.) 1, at pp. 16, 17; 10 W. R. P. C. 17, at p. 23.

[6] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 14; 1 Mad. 174, at pp. 190, 191; 26 W. R. C. R. 21, at pp. 25, 26, explaining *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 442, 443; 1 B. L. R. (P. C.) 1, at p. 17; 10 W. R. P. C. 17, at p. 23. In the latter case the consent of a majority of the *sapindas* was held sufficient. See *Parasara*

A widow should give to all the *sapindas* concerned an opportunity to advise her with regard to making an adoption, or against adopting a particular boy.[1]

The omission by the widow to ask the consent of one of two divided brothers of the deceased husband could not be justified by saying that it was known he would refuse. To consult him is essential to the widow's obtaining the mind of the kinsman on the question.[2]

Where the nearest *sapinda* refuses his consent upon improper grounds, the consent of a remoter *sapinda* will justify an adoption.[3]

Nature of consent.

The consent of the *sapindas* must be free, and given solely in the due exercise of the discretion confided to them by the law with a view to the selection of a suitable boy for adoption. Thus a consent given on an untrue representation that the widow had received the permission of her husband is of no effect.[4]

Gifts to procure assent.

In the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*[5] the Judicial Committee said: "Though gifts to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption," but there is apparently no doubt that a consent obtained only by a money payment and without proper consideration of the propriety of the adoption, would vitiate an adoption.[6]

"There is nothing improper in a *sapinda* proposing to give his assent to a widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or more distant *sapinda*, if there be no reasonable objection to the adoption of his own

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Bhattar v. *Rangaraja Bhattar* (1880), 2 Mad. 202, at p. 206, in which case the assent of some *sapindas* was held sufficient on its being shown that the consent of the others was refused from interested or improper motives, or without a fair exercise of discretion. See also *Venkatakrishnamma* v. *Annapurnamma* (1899), 23 Mad. 486, where one *sapinda*, without giving any reason, refused to consent. As to the necessity for a consideration by the *sapindas*, see *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at pp. 192, 193; 1 Mad. 69, at pp. 82, 83; 25 W. R. C. R. 291, at pp. 302, 303; *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173; 2 Mad. 270. In this case the family was joint.

[1] *Venkamma (Jonnalagadda)* v. *Subrahmaniam (Jonnalagadda)* (1906), 34 I. A. 22; 30 Mad. 50; 11 C. W. N. 345.

[2] *Ibid.*

[3] *Venkatarama Raju* v. *Papamma* (1914), 39 Mad. 77.

[4] *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 193; 1 Mad. 69, at p. 82; 25 W. R. C. R. 291, at pp. 302, 303; *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173; 2 Mad. 270; *Venkamma (Jonnalagadda)* v. *Subrahmaniam (Jonnalagadda)* (1906), 34 I. A. 22; 30 Mad. 50; 11 C. W. N. 345; 9 Bom. L. R. 89; S. C. in Court below, *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 627. See *Danakoti Ammal* v. *Balasundara Mudaliar* (1911), 36 Mad. 19.

[5] (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. (P. C.) 1, at p. 17; 10 W. R. P. C. 17, at p. 24.

[6] *Danakoti Ammal* v. *Balasundara Mudaliar* (1911), 36 Mad. 19.

son," [1] or to his stipulating that his own share should not be reduced by the adoption.[2]

When the majority of the *sapindas* consent, it will be presumed that their assent was given on *bonâ fide* grounds.[3]

The assent must be to an adoption of a specified boy, and not to an adoption generally. It must be acted upon within a reasonable time,[4] and has no operation after the death of the person giving it.[5]

Senior widow.

An adoption by the senior widow with the consent of the *sapindas* is valid without the consent of the junior widow;[6] but an adoption by the junior widow without the consent of the senior widow is invalid.[7]

Maharashtra school.

According to the *Maharashtra* school a widow can adopt either with her husband's express permission [8] or without such permission,[9] if the estate be vested in her [10] and there be no express [11] or implied [12] prohibition by him. If the husband was

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[1] *Subrahmanyam* v. *Venkamma* (1903), 26 Mad. 27, at p. 837.

[2] *Srinivasa Ayyangar* v. *Rangasami Ayyangar* (1907), 30 Mad. 450.

[3] *Venkatakrishnamma* v. *Annapurnamma* (1899), 23 Mad. 486, at p. 488.

[4] See *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681, at p. 685.

[5] See *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410; 7 Bom. L. R. 436.

[6] *Narayanasami Naick* v. *Mangammal* (1905), 28 Mad. 315. See *post*, p. 126. As to a joint adoption, see *ante*, p. 115.

[7] *Venkatappa Nayanim Bahadur* (*Rajah*) v. *Damara Renga Rao* (1915), 39 Mad. 772.

[8] *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505; G. C. Sarkar's "Law of Adoption," p. 228.

[9] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R. (P. C.) 1, at p. 12; 10 W. R. P. C. 17, at p. 21; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at pp. 566, 568; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at 418; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565; *Ramji* v. *Ghamau* (1879), 6 Bom. 498; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. (A. C.) 181, and earlier cases cited therein; "Mayukha," chap. iv. s. 5, paras. 17, 18.

[10] *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at pp. 503, 504; *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505.

[11] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 256; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at p. 566; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 574; *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i.; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.), 114.

[12] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 256. In *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 574, the Court treated an express prohibition as the only qualification to the power of the widow, but it is

undivided in estate[1] she cannot adopt without either his express permission[2] or the consent of his coparceners.[3]

Implied authority of husband.

Where she has no express authority, the widow derives her power from authority presumed to have been given to her by her husband.[4] Such authority is implied even when the husband was a minor at the time of his death,[5] and even where the widow lives apart from her husband.[6]

Adoption of only son.

It has been held that the husband's authority would not be presumed in the case of the adoption of an only son, an act which, although not illegal, was considered sinful,[7] but apparently that decision would not now be followed,[8] and it would be held that in the absence of prohibition, her authority is co-extensive with that of her husband.[9]

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submitted that the observations of the Judicial Committee in the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at pp. 443, 445; 1 B. L. R. (P. C.) 1, at pp. 17, 18, 19; 10 W. R. P. C. 17, at pp. 24, 25, *ante*, p. 120, apply equally to a case governed by the *Maharashtra* school. In *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i., at p. xx., the husband on his death-bed refused to take a son in adoption. This was held to prevent the widow adopting, and in *Dnyanoba* v. *Radhabai*, Bom. P. J. 1894, p. 22, where the husband had repudiated his wife on account of her misconduct, a prohibition was implied. *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362. In *Malgauda Paragauda* v. *Babaji Dattu* (1912), 37 Bom. 107; 14 Bom. 1121, when the deceased had left all his property to his daughters the Court considered that there was an implied prohibition of adoption.

[1] Whether or not the husband possessed separate property, see *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at pp. 191, 192; 1 Mad. 69, at pp. 81, 82; 25 W. R. C. R. 291, at p. 302.

[2] *Bachoo Hurkisondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646; S. C. in Court below (1904), 29 Bom. 51; 6 Bom. L. R. 268.

[3] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Ramji* v. *Ghamau* (1879), 6 Bom. 498; *Dinkar Sitaram Prabhu* v. *Ganesh Shivram Prabhu* (1879), 6 Bom. 505.

[4] *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 311; 2 Bom. L. R. 1101; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 418; *Ramchandra Bhagavan* v. *Mulji Nanabhai* (1896), 22 Bom. 558, at p. 567; *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94 at p. 97; *Lakshmappa* v. *Ramava* (1866), 12 Bom. H. C. 364; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. (A. C.) 181, at p. 192. In *Lakshmibai* v. *Sarasvatibai* (1899), 23 Bom. 789, at p. 794; 1 Bom. L. R. 420, Jenkins, C.J., inclined to the opinion that in the Bombay Presidency the widow's right is inherent and not merely delegated. This view is supported by Bombay authorities (see "Nirnaya Sindhu" Sri Venkateshwar, ed. p. 229; "Vyavahara Mayukha (Mandlik)," p. 42; "Samskara Kaustaba," Benares ed., Saka 1783, p. 44), but is scarcely possible having regard to the observations of the Judicial Committee in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 436; 1 B. L. R. (P. C.) 1, at p. 12; 10 W. R. P. C. 17, at p. 21.

[5] *Vandravan Jekisan (Patel)* v. *Manilal Chunilal (Patel)* (1890), 15 Bom. 565.

[6] *Lakshmibai* v. *Sarasvatibai* (1899), 23 Bom. 789; 1 Bom. L. R. 420.

[7] *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364.

[8] See *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Balusu)* (1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at p. 437; 1 Bom. L. R. 226, *post*, pp. 145, 146.

[9] See *Lakshmibai* v. *Sarasvatibai* (1899), 23 Bom. 789; 1 Bom. L. R. 420.

Undivided family.

As under the Dravida school,[1] an assent given by her father-in-law,[2] as the head of the family, and as natural guardian of the widow, to an adoption in his lifetime,[3] would validate an adoption by the widow of a member of the undivided family. The rules as to the nature and sufficiency of the consent required for the adoption by a widow governed by the Dravida school [4] apparently apply to the case of adoption in an undivided family governed by the Maharashtra school of law.

Where more than one widow.

Where the family is divided, an elder widow can adopt without the consent of the junior widow; [5] but not so as to devest property which has vested in the younger widow as heir to a son.[6] The junior widow cannot adopt without the consent of the senior widow,[7] unless, perhaps, where the latter be incapacitated, as where she is leading an irregular life.[8]

A joint adoption by the widows seems possible in Western India.[9]

Mithila school.

According to the *Mithila* school, a widow cannot under any circumstances adopt a son to her husband.[10] She can under that school adopt a son to herself in the *Kritrima* form.[11]

Punjab.

In the Punjab the custom varies in different localities.[12]

Adoption by minor widow.

A minor [13] widow, acting under an express power given to

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[1] *Ante*, pp. 121, 122.

[2] *Vithoba* v. *Bapu* (1890), 15 Bom. 110; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at pp. 255, 256. See *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at p. 505. The observations of the Judicial Committee in *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302, seem applicable to the Maharashtra school as well as to the Dravida school.

[3] *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410; 7 Bom. L. R. 436.

[4] *Ante*, pp. 121, 122.

[5] *Rakhmabai* v. *Radhabai* (1886), 5 Bom. H. C. (A. C.) 181, at p. 192; *Ramji* v. *Ghamau* (1879), 6 Bom. 498, at p. 503.

[6] See *Lakshmibai* v. *Sarasvatibai* (1899), 23 Bom. 789, at p. 794; 1 Bom. L. R. 420; *Anandibai* v. *Kashibai* (1904), 28 Bom. 461; 6 Bom. L. R. 464; see *post*, pp. 193, 194.

[7] *Padajirav* v. *Ramrav* (1888), 13 Bom. 160.

[8] Steele, 187, 188.

[9] *Indar Kunwar (Maharani)* v. *Jaipal Kunwar (Maharani)* (1888), 15 I. A. 127, at pp. 144, 145; 15 Calc. 725, at pp. 746, 747. See *ante*, p. 115.

[10] "Dattaka Mimansa," s. 1, para. 16; "Vivada Chintamani" (Tagore's translation), pp. 74, 75; W. Macnaghten's "Hindu Law," vol. i. pp. 95, 100. See *Jairam Dhami* v. *Musan Dhami* (1830), 5 Ben. Sel. R. 3 (new edition, 3), but that was not a *Mithila* case, and therefore was not decided according to the *Mithila* law, although *Mithila* authorities were cited.

[11] *Post*, pp. 157–159.

[12] Tupper's "Punjab Customary Law," vol. ii. pp. 154, 178, 205; vol. iii. pp. 78 *et seq.*, 87, 89, 90.

[13] *I.e.* who has not attained the age of majority according to Hindu law (*ante*, pp. 46, 47).

her by her husband, can take in adoption,[1] provided, at any rate, she has attained sufficient maturity of understanding to comprehend the nature of the act.[2] The same rule would apparently also apply to an adoption under the Dravida school with the authority of the *sapindas*,[3] and to a case under the Maharashtra school, where similar authority had been given. It is apparently unsettled whether a minor widow can, in a case governed by the Maharashtra school, act upon the implied authority of her husband.[4]

When widow can adopt.

A widow cannot adopt unless she be the widow of the last full owner,[5] or the estate is vested in her as heir to her son, legitimate or adopted, who has died unmarried, or has left no child or widow surviving him,[6] or (it is submitted) unless the circumstances be such that the estate will vest in the adopted son on his adoption.[7]

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[1] *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69; *Haradhun Rai* v. *Biswanath Rai* (1815), W. Macnaghten's "Hindu Law," vol. ii. p. 180; Sircar's "Vyavastha Darpana," 2nd ed., p. 769. *Contrâ* G. C. Sarkar's "Law of Adoption," p. 249. It is there suggested that an adoption by a minor widow is voidable, but it is submitted that, if it be otherwise unobjectionable, it cannot be avoided. The Hindu law does not contemplate a voidable adoption. See *Kovvidi Sattiraju* v. *Pattamsetti Venkataswami* (1916), 32 Mad. L. J. 119.

[2] *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69, at p. 72. In this case the widow was 11 or 12 years of age, but, as the boy to be adopted had been designated by her husband, the discretion to be exercised by her was limited. See *Kovvidi Sattiraju* v. *Pattamsetti Venkataswami* (1916), 32 Mad. L. J. 119, from which it would seem that a widow cannot adopt until she has attained majority under Hindu law. See *ante*, p. 107.

[3] See Mayne's "Hindu Law," 8th ed., p. 148.

[4] Sarkar's "Law of Adoption," p. 250.

[5] *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, at p. 329; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayah Modak* (1896), 22 Bom. 551. As to the application of this principle to coparcenary property, and to an impartible zemindari, see *Madana Mohana* v. *Purushothamu* (1914), 38 Mad. 1105. See also cases, *post*, pp. 130, 131.

[6] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1897), 11 Bom. 381, at p. 397. See *post*, pp. 130, 131.

[7] As was the case in *Deeno Moyee Dossee (Sreemutty)* v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, where a Hindu, governed by the Bengal school of law, left his property to a boy to be adopted by the widow of his son, who had predeceased him. In this case the boy took under the will, but the Court treated the adoption as valid, and in *Deeno Moyee Dossee (Sreemutty)* v. *Tarachurn Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note, which referred to the same adoption, the Court held that the widow took as heir of the son so adopted and thus upheld the adoption. There might also be the case of a woman taking as heir of her son's son.

It was said in a Bombay case [1] that the mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid,[2] and in the same case it was held that the defect in the adoption was cured by the assent of the person in whom the estate is vested by inheritance,[3] and that an adoption is validated, where there has been a ratification by conduct or acquiescence.[4]

A woman in the Bombay Presidency who inherits as widow of a *gotraja sapinda* [5] cannot adopt so as to confer upon the adopted son a right to the property so inherited by her.[6] There seems to be no reason why she should not validly adopt to her husband.

Where a son who is a coparcener in joint property governed by the Mitakshara school of law, or being governed by either school of law is possessed of separate property, predeceases his father there seems to be no reason why his widow should not take a son in adoption, and, quite apart from the possession of property, why such adoption should not be valid at any rate for spiritual purposes.[7]

Sastri G. L. Sarkar says in his "Law of Adoption" [8]—

Competition between mother-in-law and daughter-in-law.

"If the ancestral estate is vested in the mother-in-law by reason of her son predeceasing his father, it would appear that both the mother-in-law and daughter-in-law are competent to adopt. What has been laid down is that the adoptive father's estate must be vested in the adopting widow, in order that an adoption made by her may be valid. If the daughter-in-law adopts first, then the mother-in-law cannot make an adoption during the life of the son adopted by the daughter-in-law, for the father-in-law cannot under that circumstance be considered as destitute of male issue, there being that grandson by adoption in existence. But if the mother-in-law adopts first, then the daughter-in-law cannot be precluded thereby from making an adoption for the spiritual benefit of her husband who would not be benefited by his mother's adoption. This distinction would apply to all similar cases in all the schools."

Time for exercise of power.

In the absence of express direction to the contrary,[9] a power

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[1] *Payapa* v. *Appanna* (1898), 23 Bom. 377, followed in *Shidappa* v. *Ningangauda* (1914), 38 Bom. 724; 16 Bom. L. R. 663.

[2] *Ibid.*

[3] *Quaere* as to this, see *post*, pp. 156, 157.

[4] *Quaere* as to this. The invalidity of an adoption cannot, it is submitted, be cured by any subsequent event. It is submitted that the validity of an adoption can only be tested by the state of affairs at the time of the adoption. See *Kovvidi Sattiraju* v. *Pattamsetti Venkataswami* (1916), 32 Mad. L. J. 119.

[5] *Post*, p. 412.

[6] *Datto Govind Kulkarni* v. *Pandurang Vinayak* (1908), 32 Bom. 499; 10 Bom. L. R. 692.

[7] See *Payapa* v. *Appanna* (1898), 23 Bom. 327; *Shidappa* v. *Ningangauda* (1914), 38 Bom. 724; 16 Bom. L. R. 663.

[8] P. 264.

[9] See *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371.

of adoption, whether express or implied,[1] may be exercised at any time, provided it be not exhausted, or be not at an end.[2]

Adoptions made twelve,[3] twenty-two,[4] twenty-five,[5] fifty-two,[6] and even seventy-one [7] years after the death of the adoptive father have been upheld.

Except, perhaps, in Bengal, a power, which does not expressly or impliedly prohibit successive adoptions, is not exhausted by having been once exercised.[8] Successive adoptions.

According to the Bengal authorities, such permission is exhausted by having been once exercised; [9] but in *Kannepalli Suryanarayana* v. *Pucha Venkata Ranama*,[10] the Judicial Committee in dealing with a Madras case, say that they are unable to attach much weight to *Gournath Chowdhree* v. *Arnopoorna Chowdrain*,[11] and also say, "The more liberal rule had been followed by the High Court of Bombay, as well as in Madras, and was not without support in Bengal (see *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*,[12] and the *Ramnad* case [13])." It is therefore unlikely that, if a Bengal case on this subject were to come before the Judicial Committee, the Bengal authorities would be followed. See *ante*, p. 117.

In the case of an impartible zemindari where the document authorized

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[1] F. Macn. 157.

[2] *Post*, pp. 130, 131.

[3] Anon. (1814), 2 Morl. Dig. 18.

[4] *Bhasker Buchajee* v. *Narro Raghunath* (1826), Bom. Sel. R. 24.

[5] *Giriowa* v. *Bhimaji Raghunath* (1884), 9 Bom. 58.

[6] *Brijbhookunjee Muharaj* (*Sree*) v. *Gokoolootsaojee Muharaj* (*Sree*) (1816), 1 Borr. 181 (edition of 1862, p. 217).

[7] *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. (A. C.) 191.

[8] *Kannepalli Suryanarayana* v. *Pucha Venkata Ramana* (1906), 33 I. A. 145; 29 Mad. 382; 10 C. W. N., 921; 8 Bom. L. R. 700; S. C. in Court below, *Suryanarayana* v. *Venkataramana* (1903), 26 Mad. 681. See *Parasara Bhattar* v. *Rangaraja Bhattar* (1880), 2 Mad. 202; *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 10; 1 Mad. 174, at pp. 186, 187; 26 W. R. C. R. 21, at p. 23. Cf. *Dharam Kunwar* (*Rani*) v. *Balwant Singh* (1912), 39 I. A. 142: 34 All. 398; 16 C. W. N. 675; 14 Bom. L. R. 485.

[9] *Purmanund Bhuttycharuj* v. *Ooomakunt Lahoree* (1828), 4 Ben. Sel. R. 318 (new edition, 404); *Gournath Chowdhree* v. *Arnopoorna Chowdhrain*, Ben. S. D. A. 1852, p. 332; *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachurn Koondoo Chowdhry* (1865), 1 Bourke (A. O. C.) 48; 3 W. R. M. A. 7, note; *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46; F. Macn. 156, 179. Sir W. Macnaghten (vol. i. pp. 86–90) treats the point as disputed. He says that according to the doctrine of the "Dattaka Mimansa," the second adoption would clearly be illegal; but that Jagannatha holds that it would be valid, the object of the first being defeated.

[10] (1906), 33 I. A. 145; 29 Mad. 382; 10 C. W. N. 921; 8 Bom. L. R. 700.

[11] Ben. S. D. A. 1852, p. 332.

[12] (1891), 18 Calc. 385. In that case there had been permission to adopt three sons in succession.

[13] *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. P. C. 1, at pp. 17, 18; 10 W. R. P. C. 17, at p. 24. This was a Madras case.

successive adoptions, it was held that the power could not be exercised where there was a person in existence (widow of a later male owner) who could legally adopt.[1]

Termination of power.

A widow's power to adopt is at an end for all purposes as soon as the estate of her husband is vested in an heir [2] (other than herself[3]), of his natural or adopted [4] son, or of his son's son,[5] or son's son's son who has inherited to him, and is not revived by the death of such heir, even when on such death she herself succeeds to the property which belonged to her husband, and therefore by adopting, devests no estate but her own.[6]

This rule applies, whether there be an express power given by the husband, or such power be implied,[7] as in the Maharashtra

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[1] *Madana Mohana* v. *Purushothama* (1914), 38 Mad. 1105, at p. 1120, *per* Seshagiri Ayyar, J.

[2] In *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1902), 26 Bom. 526; 4 Bom. L. R. 315, the son had left a son, and in *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108, he had left an adopted son. In the following cases the son had left a widow: *Bhoobun Moyee Debia (Mussumat)* v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229, at p. 245; 8 Calc. 302, at p. 309; *Tarachurn Chatterji* v. *Suresh Chunder Mookerji* (1889), 16 I. A. 166; 17 Calc. 122; *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67, at pp. 70, 71; 10 Mad. 205, at p. 209; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416; *Keshav Ram Krishna* v. *Govind Ganesh* (1884), 9 Bom. 94; *Manikyamala Bose* v. *Nanda Kumar Bose* (1906), 33 Calc. 1306; 11 C. W. N. 12; *Amulya Charan Seal* v. *Kali Das Sen* (1905), 32 Calc. 861.

[3] *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21; *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, at p. 310; 2 Bom. L. R. 1101; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331. See *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, and cases *post*, p. 193, notes 5, 6.

[4] See *Bhoobun Moyee Debia (Mussumat)* v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at p. 310; 3 W. R. P. C. 15, at p. 18; *Manik Chand Golecha* v. *Jayat Settani Prankumari Bibi* (1889), 17 Calc. 517.

[5] In *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565, the son was succeeded by his mother, and in *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 246, by his grandmother. *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331.

[6] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302, reversing *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (1879), 5 Calc. 615. (This case also had the effect of overruling *Bykant Monee Roy* v. *Kistosoonderee Roy* (1867), 7 W. R. 392.) *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67, at pp. 70, 71; 10 Mad. 205, at p. 209; *Ramkrishna Ramchandra* v. *Shamrao Yeshwant* (1902), 26 Bom. 526; 4 Bom. L. R. 315; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331; *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (1892), 17 Bom. 164.

[7] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416; *Keshav Ram Krishna* v. *Govind Ganesh* (1884), 9 Bom. 94; *Ramchandra* v. *Shamrao* (1902), 26 Bom. 526, at p. 528. See *Anandibai* v. *Kashibai* (1904), 28 Bom. 461; 6 Bom. L. R. 464.

school, or the power be exerciseable with the consent of the *sapindas*.[1]

This rule applies only to property vested by inheritance, and does not prevent the devesting of an interest acquired by survivorship in the case of a joint family.[2]

Jains.

It is unsettled whether this rule applies in its entirety to an adoption by a Jain widow, who can adopt without the consent of her husband.[3] It has been so applied in Bombay,[4] but in Calcutta it has been held[5] that a Jain widow in whom the estate was vested can adopt, although her husband's adopted son had died leaving a son as his heir. Although the decision rested on the distinction between the power of a Jain widow and that of the widow of an ordinary Hindu, the Court seems to have acted on the view of the decision in *Bhoobunmoyee's* case,[6] which was accepted by the Calcutta High Court in *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*,[7] but which was not accepted by the Judicial Committee in the appeal from that decision.[8]

Death of son after attainment of ceremonial capacity.

It has been attempted to extend the rule to the case where the son, although he has left no heir, other than the adopting mother, had attained to full age and complete ceremonial capacity,[9] or had been married,[10] but this extension has not been recognized.[11]

Surrender of estate.

It may be a question whether the power to adopt would not be at an end when the widow has devested herself of the estate by surrender, or authorized alienation.[12]

Joint family.

It is submitted that in the case of a joint family governed by the Mitakshara law, the power of a widow to adopt extends until partition.[13]

A widow of a deceased coparcener cannot adopt after the

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[1] *Thayammal* v. *Venkataramd-Aiyan* (1887), 14 I. A. 67; 10 Mad. 205.

[2] See *Madana Mohana* v. *Purushothama* (1914), 38 Mad. 1105, *per* Sheshagiri Ayyar, J.

[3] *Ante*, pp. 119, 120.

[4] *Amava* v. *Mahadgauda* (1896), 22 Bom. 416.

[5] *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi* (1889), 17 Calc. 518, at pp. 537, 538.

[6] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 277, at p. 310; 3 W. R. P. C. 15, at p. 18.

[7] (1879), 5 Calc. 615

[8] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc, 302.

[9] See *Ram Soondur Singh* v. *Surbanee Dossee* (1874), 22 W. R. C. R. 121; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Amava* v. *Mahadgauda* (1896), 22 Bom. 416, at p. 421; *Verabhai Ajubhai* v. *Hiraba* (*Bai*) (1903), 30 I. A. 234; 27 Bom. 492; 7 C. W. N. 716; 5 Bom. L. R. 534.

[10] *Venkappa Bapu* v. *Jivaji Krishna* (1900), 25 Bom. 306, see p. 311; 2 Bom. L. R. 1101.

[11] Cases in notes 9 and 10 above.

[12] See Sarkar's "Law of Adoption," p. 416.

[13] See Sarkar's "Law of Adoption," pp. 253, 254.

property has vested in a widow or other heir of the last survivor of the coparcenary.[1]

Remarriage.

A widow by remarriage apparently loses her power to take in adoption.[2]

Unchaste widow.

It is unsettled whether an unchaste widow can adopt.

In *Sayamalal Dutt* v. *Saudamini Dasi*,[3] Norman, J., held that an unchaste widow, who was pregnant by the man with whom she was living in a state of concubinage, and who had not performed any expiation, could not take in adoption. This decision was based upon the alleged necessity for the performance of religious ceremonies, but, as the parties were Sudras, it is clear [4] that no religious ceremonies were necessary, and it is therefore doubtful whether this decision can be viewed as an authority. Where religious ceremonies are unnecessary (and it is by no means clear that in any case religious ceremonies are requisite in the case of adoption by a widow [5]), there seems to be no other authority prohibiting adoption by an unchaste widow. If she be not actually pregnant, she can remove the bar, if it be one, by expiation.[6]

As a widow adopts, not for her own benefit, but for that of her deceased husband, it may seem hard that her want of chastity should deprive his manes of the benefits which, according to Hindu ideas, accrue from an adoption.

Ceremonial impurity.

The question whether a widow, who is in a state of ceremonial impurity from the death or birth of a relation, and who has not performed the necessary expiation, is competent to adopt, is apparently the same as the question whether a man can under such circumstances adopt.[7]

If she can, as apparently she can, depute a relation to perform such ceremonies, if any, as may be necessary,[8] there can be no objection to an adoption by her. There is, moreover, a question whether any religious ceremonies are necessary in the case of an adoption by a widow.[9] If none are necessary, her ceremonial impurity cannot affect the adoption.

Adoption only valid if husband could have adopted.

A widow's power of adoption cannot be exercised unless the

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1 *Adivi Suryaprokasa Rao* v. *Nidamarty Gangaraju* (1909), 33 Mad. 228.

2 West and Bühler, p. 999, referred to in *Panchappa* v. *Sanganbasawa* (1899), 24 Bom. 89, at p. 94; 1 Bom. L. R. 543; Sarkar's "Law of Adoption," p. 251, see, however, *Putlabai* v. *Mahadu* (1908), 33 Bom. 107; 10 Bom. L. R. 1134.

3 (1870), 5 B. L. R. 362.

4 *Post*, p. 153.

5 *Post*, p 155.

6 See *Thukoo Baee Bhide* v. *Ruma Baee Bhide* (1824), 2 Borr. 446, at p. 456.

7 *Ante*, pp. 110, 111. See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214; *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 395.

8 See *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. (O. C.) 244; Sarkar's "Law of Adoption," p. 213.

9 *Post*, p. 155.

circumstances are such as would have justified an adoption by her husband, if alive.[1]

Thus she cannot adopt a boy whom her husband could not have adopted, and she cannot adopt so long as a son, son's son, son's son's son of her husband be in existence.[2] During that time her power of adoption is in suspense.[3] In the event of the son, grandson, or great-grandson dying unmarried, or leaving no son or widow behind him, the power, if it still be in existence,[4] can be exercised.[5]

No obligation to adopt.

A widow is under no legal obligation to exercise a power of adoption.[6] An express direction by the husband cannot be enforced,[7] even if he directed the adoption of a particular boy.[8] The widow does not, by the non-exercise of the power, forfeit any of her rights as widow,[9] or mother.[10]

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[1] *Puttu Lal* v. *Parbati Kunwar* (*Musammat*) (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841; 17 Bom. L. R. 549. See *ante*, p. 103.

[2] *Gopeelall* v. *Chundraolee Buhoojee* (*Mussamut Sree*), (1872), I. A. Sup. Vol. 131; 11 B. L. R. 391; 19 W. R. C. R. 12.

[3] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337.

[4] See *ante*, pp 130, 131.

[5] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392. See *Vellanki Venkata Krishnâ Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21.

[6] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Pearee Dayee* (*Mussamut*) v. *Hurbunsee Kooer* (*Mussamut*) (1873), 19 W. R. C. R. 127; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, at p. 7; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25; *Rajcoomaree* (*Sreemutty*) v. *Nobocoomar Mullick* (1856), 1 Boul. 137; Sev. 641, note; *Dyamoyee Chowdhrain* v. *Rasbeharee Singh*, Ben. S. D. A. 1852, 1001, at p. 1013. See *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202.

[7] See *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

[8] See *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85. This question was suggested, but not decided, in *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190, and in *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202, at p. 215.

[9] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Raman Ammal* v. *Subban Annavi* (1865), 2 Mad. H. C. 399; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160; *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, at p. 7; *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachurn Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

[10] *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachund Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note.

In a case where the husband has power to deal with property by will there is nothing apparently to prevent him from enforcing the exercise of a power of adoption by a gift over of his property to some one other than the widow, in the event of the power not being exercised within a specified time.

Until she actually adopts, a widow can exercise no rights on behalf of the boy, the adoption of whom she is contemplating.[1]

Agreement not to adopt.

It is unsettled whether a covenant by a widow not to adopt is valid.[2]

Such question might depend upon the nature of the power (if any).[3]

It is submitted that she could not be restrained from exercising a power, which is given to her, not for her own benefit, but for that of her husband.

Capacity to give in Adoption.

Father.

The natural father [4] can give in adoption where there is no dissent by the mother, and, even in case of such dissent, the weight of authority is in favour of the father's power to give his son in adoption.

In *Narayanasami* v. *Kuppusami* (1887), 11 Mad. 43, at p. 47, it is said, "Where there is a competition between the father and mother, the former has a predominant interest or a potential voice."

Mr. Mayne says,[5] "It is quite settled that the father alone has absolute authority to dispose of his son in adoption, even without the consent of his wife, though her consent is generally sought and obtained." He cites two cases. In one (*Alank Manjari* v. *Fakir Chand Sarkar* (1834), 5 Ben. Sel. R. 356 (new edition), 418), the question was as to the adoptive mother's consent, which is a different question from the present one. In the other (*Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199), the question did not arise, but (at p. 202) the Court says, "In the eye of Hindu

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[1] *Subudra Chowdrayn (Mussamaut)* v. *Goluknath Chowdhry* (1843), 7 Ben. Sel. R. 143 (new edition, 166).

[2] In *Assur Purshotam* v. *Ratanbai* (1888), 13 Bom. 56, the Court refused to issue an *ad interim* injunction restraining the widow from adopting.

[3] See Mayne's "Hindu Law," 8th ed., p. 151.

[4] An adoptive father cannot give in adoption. See *post*, p. 148.

[5] "Hindu Law," 8th ed., p. 168. Strange ("Hindu Law," vol. i. p. 81) says, "As in adopting, so in giving in adoption, though the concurrence of parents is desirable, the husband appears, by the weight of authority, to be independent of the wife, the father of the mother." See "Dattaka Mimansa," s. 4, paras. 10, 11, 13–15, 17 (see also s. 1, paras. 15, 16); s. 5, para. 14, and note, and s. 6, paras. 50, 51; "Mitakshara," chap. i. s. 11, para. 9; Colebrooke's "Digest," vol. iii. pp. 244, 254, 257, 261; "Viramitrodaya," chap. ii. part ii. s. 8 (G. C. Sarkar's translation), p. 115; "Dattaka Chandrika," s. 1, paras. 31, 32. *Contrâ*, see "Mitakshara," chap. i. s. 11, para. 9, note; Sutherland's "Synopsis," note 9 (p. 224); "Vyavahara Mayukha" (Mandlik's edition), p. 50.

law, when a man gives his son in adoption, he would seem to exercise a power, more like the power of an absolute proprietor than of a guardian."

Sastri G. C. Sarkar [1] contends that the abolition of slavery has impliedly destroyed a Hindu father's absolute dominion over his son, and concludes, "The proper view to take, therefore, seems to be that the father alone is incompetent to give when the mother is opposed to it, and that such gift is not void, but voidable only at the instance of the mother."

Nanda Pandita [2] contends that unless the mother consents, the adoption does not affect the boy's relationship to his maternal relations. It is scarcely likely that this view would now be taken by the Courts.

Mother.

A mother can, during the father's lifetime, with his consent, give her son in adoption.[3]

On the death of the father, or on his being permanently absent from home, or on his entering a religious order, or losing his reason, or otherwise becoming incapable of giving his consent, a mother can give her son in adoption,[4] provided that the father has neither expressly nor impliedly prohibited her from so doing.[5]

Circumstances of parent immaterial.

The power to give in adoption is not limited to a season of distress, nor

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1 "Law of Adoption," pp. 274, 275.

2 "Dattaka Mimansa," vi. 50, 51.

3 *Lallubhai Bapubhai* v. *Mankuvarbhai* (1876), 2 Bom. 388, at pp. 404, 405; Sarkar's "Law of Adoption," p. 276.

4 *Jogesh Chandra Banerjee* v. *Nrityakali Debi* (1903), 30 Calc. 965. S. C. *sub nom. Jogesh Chunder Bandopadhya* v. *Jonabali Bepari*, 7 C. W. N. 871; *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377, at p. 380; *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi.; *Hurra Soondree Dassee* v. *Chundermoney Dassee*, Sev. 938; *Arnachellum Pillay* v. *Iyasawmy Pillay* (1817), 1 Mad. Sel. Dec. 154; 1 Norton, L. C. 90. (In that case the knsmen assented, but such assent was not considered necessary in *Narayanasami* v. *Kuppusami* (1887), 11 Mad. 43, at p. 47, or in *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53, at p. 58.) "Mitakshara," chap. i. s. 11, para. 9. See "Manu," chap. ix. para. 168. As to Jains, see *Asharfi Kunwar* v. *Rup Chand* (1908), 30 All. 197; S. C. on appeal *Rup Chand* (*Lala*) v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402.

5 *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377; *Narayanasami* v. *Kuppusami* (1886), 11 Mad. 43, at pp. 47, 48. See *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145, at p. 160; 11 W. R. C. R. 468, at p. 476; *Gurulingaswami* (*Sri Balusu*) v. *Ramalakshmamma* (*Sri Balusu*) 1899), 26 I. A. 113, at p. 128; 22 Mad. 398, at p. 408; 3 C. W. N. 427, at pp. 436, 437; 1 Bom. L. R. 226. See S. C. in Court below, *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53, at pp. 58, 59. Sir G. D. Banerjee ("Law of Marriage," 3rd ed., pp. 177, 178) says that except in Southern India a mother can only give in adoption with the consent of her husband, and relies on "Manu," chap. ix. para. 168, "Dattaka Mimansa," s. 1, para. 15, and "Dattaka Chandrika," s. 1, para. 31. See, however, "Dattaka Chandrika," s. 1, para. 32.

is it affected by the possession of means by the giver.[1] Her right is said to arise from the maternal relation, and not by delegation from her husband.[2]

No one else can give.

Under no circumstances can any one other than the father or mother give a boy in adoption.[3]

A stepmother,[4] a brother,[5] and a paternal grandfather,[6] have no power to give in adoption.

Delegation of right.

Delegation of act of giving.

The power to give a son in adoption cannot be delegated to any person; [7] but a father or mother may authorize another person to perform the physical act of giving a son in adoption to a named person.[8]

Gift of son by minor.

It is not settled whether a minor father or mother can give his or her son in adoption.

The Hindu law books do not expressly prohibit a minor from giving a son in adoption.[9] This is probably for the reason that the event would be unlikely to occur. The question apparently stands upon the same footing as the capacity to take in adoption,[10] and, at any rate, a father who has not attained the age of discretion [11] would apparently be incompetent to give his son in adoption. As a Hindu minor [12] cannot make a will, and apparently cannot appoint a testamentary guardian,[13] it would seem unlikely that he would have power to dispose of a child, in respect of whose custody after his death he could make no provision.

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[1] The precepts prohibiting a gift except in time of distress are not rules of law. See "Manu," chap. ix. para. 168; "Dattaka Mimansa," s. 4, paras. 19, 20; "Mitakshara," chap. i. s. 11, para. 10.

[2] *Putlabai* v. *Mahadu* (1908), 33 Bom. 107; 10 Bom. L. R. 1134; "Mitakshara," chap. i. s. 11, paras. 9, 10; "Manu," chap. ix., para. 168; "Yajnavalkya," ii. 130; Mandlik's "Hindu Law," p. 148.

[3] *Ibid.* See "Vasistha," xv. ss. 2, 5; Colebrooke's "Digest," vol. iii. p. 242; "Manu," chap. ix. para. 168; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 376; *Vaithilingam Mudali* v. *Marugaian* (1912), 37 Mad. 529.

[4] *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384.

[5] *Tara Munee Dibia (Mussummaut)* v. *Devnarayun Rai* (1824), 3 Ben. Sel. R. 387 (2nd edition, 516); *Moothoosawmy Naidu* v. *Lutchmydavummah*, Mad. Dec. 1852, p. 96; Norton L. C. i. 66 (differing from *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 78, at p. 109); "Vyavastha Darpana," 825.

[6] *Collector of Surat* v. *Dhirsingji Vaghbaji* (1873), 10 Bom. H. C. 235. See *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note.

[7] *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241; *Bashettiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268.

[8] *Shamsing* v. *Santabai* (1901), 25 Bom. 551; 3 Bom. L. R. 89; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 257.

[9] G. C. Sarkar's "Law of Adoption," p. 371.

[10] *Ante*, pp. 106, 107.

[11] *Ante*, p. 107.

[12] That is, a minor within the meaning of the Indian Majority Act (IX. of 1875).

[13] *Post*, p. 213.

There seems no reason why an adult father could not give to his minor widow power to dispose of his son in adoption.

Abandonment of Hinduism.

It has been held that a Hindu father, at any rate if he is not a Brahmin, does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.[1]

In the case referred to the child had remained a Hindu. If the child also had become a Mahomedan, the Hindu law of adoption would have been inapplicable. In spite of the above decision, there is a question whether a father, who has by his conversion adopted a system of law which does not recognize the adoption of sons, can retain a portion of the system which he has repudiated.[2] Act XXI. of 1850 merely destroys the effect of any law or usage which inflicts a forfeiture of rights or property upon persons changing their religion. In this case the forfeiture, if it can be so described, does not arise from any law or usage. There is, it is submitted, an abandonment of a right, by virtue of the voluntary assumption of other rights which are inconsistent with such right. The above decision is based upon authorities which deal with the right of custody, which is a right known both to the system abandoned and the system adopted.

A father who has become a Brahmo does not lose his right to give his son in adoption.[3]

Remarriage of widow.

Where the father has given permission, a mother who has remarried can give her son in adoption, whether or not she belongs to a caste in which remarriage is customary.[4]

When the father has not given such permission it is unsettled whether she can give in adoption. In one case [5] it was said that she has such power and in another case [6] the power was denied. If a woman could be said to be acting as agent for her husband,[7] she would undoubtedly lose her power by her remarriage; but the mother's right is said to arise from her maternal relation, and not from any idea of agency.[8] The texts of Hindu law did not contemplate remarriage. The Hindu Widows' Remarriage Act,[9] in some cases deprived her of her rights of guardianship, but it does not deprive a widow of any rights except in the matters provided in the Act. As a mother would not lose her right by loss of caste, or, it is submitted, necessarily by a change of religion,[10] it is submitted that she does not lose her right by remarriage.

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[1] *Shamsing* v. *Santabai* (1901), 25 Bom. 551; 3 Bom. L. R. 89.

[2] See *Jowala Buksh* v. *Dharum Singh* (1866), 10 M. I. A. 511, at p. 537; *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 243; 1 W. R. P. C. 1, at p. 5.

[3] *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 199; 7 C. W. N. 784.

[4] *Putlabai* v. *Mahadu* (1908), 33 Bom. 107; 10 Bom. L. R. 1134; *Panchappa* v. *Sanganbasawa* (1899), 24 Bom. 89; 1 Bom. L. R. 543.

[5] *Putlabai* v. *Mahadu* (1908), 33 Bom. 107; 10 Bom. L. R. 1134.

[6] *Panchappa* v. *Sanganbasawa* (1899), 24 Bom. 89; 1 Bom. L. R. 545.

[7] See "Dattaka Chandrika," s. 1, para. 31.

[8] *Ante*, p. 136.

[9] Act XV. of 1856, s. 3, *post*, pp. 216, 217.

[10] See above.

Who may be taken in Adoption.

Identity of class.

The boy must belong to the same primary caste as that of his adoptive father.[1]

For instance, a Brahmin cannot adopt a Kshatriya or a Sudra.

The reason for this rule is that the adoptive father could not have married the natural mother, when a virgin, as she belonged to a different class.[2]

There seems to be nothing to prevent an adoption of a boy belonging to a different subdivision of the Sudra class,[3] as the weight of authority is in favour of the legality of a marriage between persons belonging to different subdivisions of that class.[4]

No preferential right.

No boy has a preferential or any right to be adopted, and there is nothing to prevent the adoption of a stranger, even though there be a near relation qualified for adoption.

The texts which prescribe the preferential adoption of a *sapinda* have not the force of law.[5]

Relationship of adoptive father to natural mother.

It has been laid down that among the three twice-born classes, no one whose mother, when she was a virgin,[6] the adoptive father (or the husband of a widow taking a boy in adoption), was by reason of propinquity barred from legally marrying, can be adopted,[7] but it is submitted that the

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[1] "Manu," chap. ix. para. 168; "Mitakshara," chap. i. s. 11, para. 9; "Vyavahara Mayukha," chap. v. s. 5, para. 4; "Dattaka Mimansa," s. 2, paras. 22, 23–25; "Dattaka Chandrika," s. 1, paras. 12–16. See G. C. Sarkar's "Law of Adoption," pp. 165, 357, 358.

[2] See below and *post*, p. 139.

[3] Decision of the Calcutta High Court in Regular Appeals, 274, and 322 of 1886, referred to in G. C. Sarkar's "Law of Adoption," p. 165; see also pp. 357, 358, of the same work. See, however, Sutherland's "Synopsis," head. 2, para. 1; "Dattaka Mimansa," s. 2, paras. 35, 74–78, s. 3, paras. 1–3. It has been held that a Tilari (an inferior Lingayat) may adopt a boy who is a Kulwadi: *Jukaram* v. *Babaji* (1899), Bom. L. R. 144.

[4] *Ante*, p. 38.

[5] *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40; 3 Calc. 587; 2 C. L. R. 51. S. C. in Court below, *Gocoolanund Das* v. *Wooma Daee* (1875), 15 B. L. R. 405; 23 W. R. C. R. 340; *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80; *Babaji Jivaji* v. *Bhagirthibai* (1869), 6 Bom. H. C. A. C. 70.

[6] See *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15.

[7] *Minaksi* v. *Ramanada* (1887), 11 Mad. 49 (in this case the prohibition was laid down as a general rule of Hindu law without reference to any distinction between the twice-born classes and Sudras, but the judgment is based upon considerations inapplicable to Sudras); *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273; *Bhagirthibai* v. *Radhabai* (1879), 3 Bom. 298; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462. See also judgment

prohibition should be confined to the sister's son, daughter's son, and mother's sister's son.[1]

This rule in its present form was first enunciated by Mr. Sutherland in his "Synopsis." [2] He deduced this rule from a rule which had reference to the obsolete practice of *niyoga*, which, when used in this sense, means the appointment of a kinsman to raise up issue by the wife of a childless husband, or of one deceased without leaving children.[3]

A text of Saunaka [4] requires the boy adopted to bear "the reflection of a son." Nanda Pundita [5] in construing this text, held that the resemblance must consist in "the capability to have sprung from (the adopter) himself, through an appointment (to raise up issue on another's wife), and so forth,[6] as (in the case) of the son, of a brother, a near or distant kinsman, and so forth."

As the practice of *niyoga* is now obsolete,[7] the rules by which it was regulated in respect of the person selected for appointment are not, as such, now used for the purpose of testing the capability of the person to be adopted, but in their place the rules as to the prohibited degrees in the case of marriage have been substituted.

The two sets of rules have been held not to conflict,[8] but they do not appear to completely coincide.[9] "Prohibited connection in the case of marriage has reference to the relationship in which the couple between whom marriage is proposed stand, irrespective of marriage, and when the girl selected for marriage is a maiden. But prohibited connection in the case of *niyoga* has reference to the relationship between a married woman and the person who is appointed to beget a child upon her. . . . The rules of prohibited connection had a common object in both cases, viz. the prevention of incest.

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of Banerjee J., in *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294; *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 398; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473; 2 Bom. L. R. 163.

[1] See *Ramchandra* v. *Gopal* (1908), 32 Bom. 619; 10 Bom. L. R. 948, *post*, p. 140.

[2] Stokes' "Hindu Law Books," p. 664. As to the rules of exclusion by reason of propinquity in the case of marriage, see *ante*, pp. 40–44. Where the adopting father has himself been removed from his natural family by adoption this rule would debar him from adopting the son of a woman whom he could not have married before being so removed, and also the son of one whom he could not have married after having been so removed. See Mad. Dec. of 1858, p. 117.

[3] Wilson's "Glossary," p. 380.

[4] "A *rishi* of unquestioned authority."

[5] "Dattaka Mimansa," s. 5, para. 16.

[6] "The phrase 'so forth' is explained to refer to a legal marriage having been possible between the adopter and the mother of the boy fixed for adoption." *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16.

[7] See *ante*, p. 100.

[8] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 54. See also *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 322. (In the appeal in this case (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454, 1 Bom. L. R. 311, this view was not disturbed.)

[9] See Bhattacharya's "Hindu Law," 2nd ed., p. 169.

In the case of marriage, there are three prohibitions,[1] viz.—

(i.) The couple between whom marriage is proposed should not be *sapindas*;

(ii.) They should not be *sagotras*; and

(iii.) There should be no *Viruddha Sanbandha* or contrary relationship, that is, such relationship as would render sexual connection between them incestuous. This contrary relationship is defined as consisting in the couple being so related to each other that by analogy the one is the father or the mother of the other, as, for instance, the daughter of the wife's sister and the sister of the paternal uncle's wife." [2]

According to the *niyoga* rule, "The relations prohibited for adoption by a man are: the paternal uncle, the maternal uncle, the brother, the four first cousins on paternal and maternal side, the brother-in-law, the sister's son, and the daughter's son." [3] Of these the father's brother's son, and the mother's brother's son,[4] would not be excluded by the marriage rules.

Whatever may have been the origin of the rule prohibiting the adoption of a boy, whose mother the adoptive father could not have married, it has been held in Madras that the Courts cannot now go behind it and test the validity of an adoption by the rules which governed the obsolete system of *niyoga*.[5]

It remains to be seen whether the Judicial Committee will, when it becomes necessary to lay down a general rule on this subject, accept the rule of prohibited degrees in marriage laid down in India, or will accept the *niyoga* rule, enunciated in the "Dattaka Mimansa," or will confine the prohibitions to the three cases which have hitherto been considered by the Committee,[6] viz. those of the sister's son, daughter's son, and mother's sister's son. These are the only cases specified by the sages Saunaka and Sakala,[7] from whose texts Nanda Pandita, in the "Dattaka Mimansa," based the *niyoga* test of exclusion.

The Bombay High Court confines the prohibitions to sister's son, daughter's son, and mother's sister's son.[8] This view is, it is submitted, the preferable one.

The high authority of the "Dattaka Mimansa" [9] might possibly give

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[1] *Ante*, pp. 39–41.

[2] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 53. Marriage between a Hindu and the daughter of his wife's sister was held to be valid in *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283.

[3] G. C. Sarkar's "Law of Adoption," p. 322, and see preceding pages.

[4] See *Virayya* v. *Hanumanta* (1890), 14 Mad. 459, at p. 461. The mother's brother's son can be adopted in the Bombay Presidency; *Yamnava* v. *Laxman Bhimrao Kulkarni* (1912), 36 Bom. 533; 14 Bom. L. R. 543.

[5] See *Virayya* v. *Hanumanta* (1890), 14 Mad. 459, at p. 461.

[6] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454; 1 Bom. L. R. 311.

[7] As to the construction of Sakala's text, see *Walbai* v. *Heerbai* (1909), 34 Bom. 491, at p. 495; 11 Bom. L. R. 1172.

[8] *Ramchandra* v. *Gopal* (1908), 32 Bom. 619; 10 Bom. L. R. 948; *Yamnava* v. *Laxman Bhimrao* (1912), 36 Bom. 533; 14 Bom. L. R. 543; *Gajanan Balkrishna* v. *Kashinath Narayan* (1915), 39 Bom. 410; 17 Bom. L. R. 372.

[9] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 161; 21 All. 412, at p. 419; 3 C. W. N. 454, at p. 457; 1 Bom. L. R. 311; *Collector of Madura* v. *Moottoo Ramalinga*

a preference to the *niyoga* test of exclusion ; but with regard to the analogy between the *Dattaka* form of adoption and this obsolete practice the Judicial Committee has said,[1] "as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention."

Special custom.

The burden of proving a special custom to the contrary amongst any members of these three classes, prevalent, either in their caste, or in a particular locality, lies upon him who avers the existence of that custom.[2]

Instances of application of rule.

In the following cases, which fall within the above-mentioned rule, adoptions have been held to be invalid.

(*a*) Daughter's son.[3]

Brahmins in the Tanjore, Trichinopoly, and Tinnevelly districts, by custom, adopt daughter's sons.[4] There seems to be a similar custom among the Nambudri Brahmins of Malabar,[5] and it has been held [6] that in the Southern Mahratta country the prohibition of the adoption of a daughter's son is not universally in force. In the Punjab there is frequently such a custom.[7]

(*b*) Sister's son.[8]

Sathupathy (1868), 12 M. I. A. 397, at pp. 435, 437; 1 B. L. R. P. C. 1, at pp. 11, 13; 10 W. R. P. C. 17, at pp. 21, 22; *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (1889), 14 Bom. 249, at p. 259; *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1880), 6 Calc. 256, at p. 265; 7 C. L. R. 145, at p. 154; *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee* (1871), 15 W. R. C. R. 548.

1 *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1868), 12 M. I. A. 396, at p. 441; 1 B. L. R. P. C. 7, at p. 16; 10 W. R. P. C. 17, at p. 23; *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 190; 1 Mad. 69, at p. 80; 25 W. R. C. R. 291, at pp. 301, 302.

2 *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at pp. 296, 297. See *Vayidinada* v. *Appu* (1885), 9 Mad. 44, at pp. 45, 46; *Minakshi* v. *Ramanada* (1887), 11 Mad. 49, at p. 55; *Lali* v. *Murlidhar* (1901), 24 All. 195, at p. 205.

3 *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 456; 1 Bom. L. R. 311; *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273; *Bhagirthibai* v. *Radhabai* (1879), 3 Bom. 298; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462, at pp. 467, 468.

4 *Vayidinada* v. *Appu* (1885), 9 Mad. 44.

5 See *Vishnu Nambudri (Eranjoli Illath)* v. *Krishnan Nambudri (Eranjoli Illath)* (1883), 7 Mad. 3.

6 *Nani (Bai)* v. *Chunilal* (1897), 22 Bom. 973, at p. 976.

7 See *Rup Narain* v. *Gopal Devi* (1909), 36 I. A. 103; 36 Calc. 780; 13 C. W. N. 920; 10 Bom. L. R. 833.

8 *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 456; 1 Bom. L. R. 311; *Lali (Mussammat)* v. *Murli Dhar* (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 730; *Narain Das (Lala)* v. *Ramanuj Dayal (Lala)* (1897), 25 I. A. 46, at p. 52; 20 All. 209, at p. 217; 2 C. W. N. 193, at p. 195; *Sundar (Mussammat)* v. *Parbati (Mussammat)* (1889), 16 I. A. 186, at p. 193; 12 All. 51, at p. 56. S. C. in Court below, *Parbati* v. *Sundar* (1885), 8 All. 1; *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at p. 693; *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420; *Gopalayyan* v. *Raghupatiayyan* (1873), 7 Mad. H. C. 250; *Kora Shunko Takoor (Doe dem)* v. *Munnee (Bebee)* (1815), East's

By custom Brahmins in the Tanjore, Trichinopoly and Tinnevelly districts,[1] the Bohra Brahmins of the northern districts of the North-Western Provinces,[2] and the Nambudri Brahmins of Malabar,[3] and Saraswat Brahmins of Kanara [4] adopt sister's sons. It has also been held that in the Southern Mahratta country the prohibition of the adoption of sister's sons is not universally in force.[5]

It has been held that a sister's daughter's son would be inadmissible for adoption.[6]

Such adoption is permissible in the Telegu and Tamil country where a marriage between a maternal uncle and his niece is allowed.[7]

(c) Mother's sister's son.[8]

(d) The son of the daughter of a *sagotra*.[9]

The father's sister's son can be adopted in the Bombay Presidency.[10] The above rule would exclude him from adoption.

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notes, case 20; Morl. Dig. vol. i. p. 18; *Shiblall* v. *Bishumber*, S. D. A. N. W. P. 1866, p. 25. In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. P. C. 25, the adoption of a sister's son was upheld. The parties were said in the report to be Vaisyas. The question as to the validity of the adoption was raised, but the case was determined on the ground that the title of the respondent was admitted by the appellant's father. In *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462, at p. 467, it was asserted that the parties to the case of *Ramalinga Pillai* were clearly Sudras. See also *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at pp. 282, 283. In *Ganpatrav Vireshvar* v. *Vithoba Khandappa* (1867), 4 Bom. H. C. A. C. 130, the adoption of a sister's son was upheld, but the parties were evidently Sudras (see *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at p. 282). In *Bhagwan Singh* v. *Bhagwan Singh* (1895), 17 All. 294, at p. 302, it is said that the parties in *Ganpatrav's* case were Vaisyas, but that the Court erred in supposing that the parties in *Ramalinga Pillai's* case were other than Sudras.

[1] *Vayidinada* v. *Appu* (1885), 9 Mad. 44.

[2] *Chain Sukh Ram* v. *Parbati* (1891), 14 All. 53. In an Agra case (*Lali* v. *Murlidhar* (1901), 24 All. 195, at pp. 197, 205), an unsuccessful attempt was made to prove that a Bohra Brahmin could adopt his sister's son.

[3] *Vishnu Nambudri* (*Eranjoli Illath*) v. *Krishnan Nambudri* (*Eranjoli Illath*) (1883), 7 Mad. 3.

[4] *Manjunath* v. *Kaveribai* (1902), 4 Bom. L. R. 140.

[5] *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973, at p. 976.

[6] *Venkata* v. *Subhadra* (1884), 7 Mad. 548, at p. 549. As to a half-sister's daughter's son, see *Karunabdi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1889), 7 I. A. 173, at p. 177; 2 Mad. 270, at p. 279.

[7] *Venkata* v. *Subhadra* (1884), 7 Mad. 548, at p. 549.

[8] *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153; 21 All. 412; 3 C. W. N. 454; *Walbai* v. *Heerbai* (1909), 34 Bom. 491; 11 Bom. L. R. 1172.

[9] *Minakshi* v. *Ramanada* (1887), 11 Mad. 49. See, however, *Ragavendra Rau* v. *Jayaram Rau* (1897), 20 Mad. 283, at p. 289, and *ante*, p. 39.

[10] *Ramkrishna Gopal Joshi* v. *Chimnaji Vyankatesh* (1913), 15 Bom. L. R. 825.

It seems that the adoptions of the following are prohibited, not by the marriage rule, which is inapplicable, but by express authority, viz. :—

Prohibition based upon *niyoga* rule.

(i.) Brother.[1]

In the Deccan the adoption of a younger brother is permitted.[2] It has been held in Bombay that a half-brother can be adopted.[3] A contrary view has been taken in Madras.[4] It is submitted that the former view is preferable.

(ii.) Paternal and maternal uncles.[5]

Having regard to the prohibition as to the age [6] of the adopted son, this case is unlikely to occur except, perhaps, in Western India.[7]

It has been held that the adoptions of the following persons are permissible, except in the case where the natural mother of the boy happens to be a person whom, as a virgin, the adoptive father could not lawfully have married.

Instances where rule does not apply.

(*a*) Brother's son's son.[8]
(*b*) Paternal uncle's son.[9]
(*c*) Paternal uncle's son's son's son.[10]

There can equally be no objection to the adoption of a paternal uncle's son's son.[11]

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[1] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16. See *Runjeet Sing* (*Baboo*) v. *Obhye Narain Singh* (1817), 2 Ben. Sel. R. 245 (2nd edition, 315); "Dattaka Mimansa," s. 5, para. 17. The *niyoga* rule (*ante*, p. 140) excluded brothers and step-brothers.

[2] See *Huebut Rao Mankur* v. *Govind Rao Balwunt Rao Mankur* (1821), 2 Borr. 75, at p. 85; Steele, 44.

[3] *Gajanan Balkrishna* v. *Kashinath Narayan* (1915), 39 Bom. 410; 17 Bom. L. R. 372.

[4] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 16.

[5] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 398; "Dattaka Mimansa," s. 5, para. 17; Sarkar's "Law of Adoption," p. 327; Macnaghten's "Hindu Law," vol. i. p. 67.

[6] *Post*, pp. 146, 147.

[7] *Post*, p. 147.

[8] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 48; 6 C. L. R. 393, at p. 400; *Morun Moee Debeah* v. *Bejoy Kishto Gossamee* (1863), W. R. Sp. No. 121.

[9] *Virayya* v. *Hanumanta* (1891), 14 Mad. 459: an unreported decision of the High Court of Bengal referred to in Sarkar's "Law of Adoption," p. 340. The paternal uncle's son is excluded by the *niyoga* rule of exclusion (*ante*, p. 140).

[10] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 47; 6 C. L. R. 393, at p. 399.

[11] In *Venkata* v. *Subhadra* (1884), 7 Mad. 548, the boy was the son of the paternal uncle's son, but no objection was made to the adoption on this ground. Such adoption is said even to be commendable. Sarkar's "Law of Adoption," p. 348.

(d) The son of the mother's father's brother's daughter's daughter.[1]

(e) The wife's brother.[2]

(f) The wife's brother's son.[3]

(g) The wife's sister's son.[4]

Sudras.

The rule as to the relationship between the adopting father and the natural mother [5] has no application to Sudras.[6]

Relationship of adopting mother to natural father.

Relationship between the adopting widow, or the wife of the adopting father, and the natural father of the boy is no impediment to an adoption.[7]

Nanda Pandita held that a woman must not adopt her brother's son,[8] but his view cannot now be accepted.[9] His view was accepted in two

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[1] *Venkata* v. *Subhadra* (1884), 7 Mad. 548. In this case, Sastri G. C. Sarkar points out ("Law of Adoption," p. 348) that having regard to the Mitakshara system of computation of degrees, the Court was in error in considering that the adopting father could, under the general Hindu law, have married the natural mother. Such marriage seems to have been permissible by a usage to which the parties were subject.

[2] *Krishniengar* v. *Vanamalay Iyengar*, Mad. Dec. of 1856, p. 213; *Runganaigum* v. *Namesevoya Pillay*, Mad. Dec. of 1857, p. 94; *Ruvee Bhudr* v. *Roopshunkar Shunkerjee* (1823), 2 Borr. 656.

[3] *Sriramulu* v. *Ramayya* (1881), 3 Mad. 15, at p. 17. See *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973, at p. 979; *Puttu Lal* v. *Parbati Kunwar* (*Musammat*) (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841; 17 Bom. L. R. 549.

[4] *Gunga* (*Baee*) v. *Sheoshunkur* (*Baee*) (1832), Bom. Sel. R. 73, at p. 76.

[5] *Ante*, pp. 138, 139.

[6] See *Bhagwan Singh* v. *Bhagwan Singh* (1899), 26 I. A. 153, at p. 160; 21 All. 412, at p. 418; 3 C. W. N. 454, at p. 452. In *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510; 1 W. R. P. C. 95, where the parties were Sudras, an adoption of a sister's son was upheld. The marginal note of the report erroneously describes the parties as Vaisyas (see *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. R. 462, at p. 467), but it does not appear whether the Judicial Committee were aware that the parties were Sudras. *Nunkoo Singh* v. *Purm Dhun Singh* (1869), 12 W. R. C. R. 356; *Jiwan Lal* v. *Kallu* Mal (1905), 28 All. 170; *Rajcoomar Lall* v. *Bissessur Dyal* (1884), 10 Calc. 688, at p. 693; *Vayidinada* v. *Appu* (1885), 9 Mad. 44, at p. 53; *Chinna Nagayya* v. *Pedda Nagayya*, (1875), 1 Mad. 62; *Phundo* v. *Janginath* (1893), 15 All. 327; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364.

[7] *Puttu Lal* v. *Parbati Kunwar* (*Musammat*) (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841, 17 Bom. L. R. 549; *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1904), 27 All. 417, differing on this question from *Battas Kuar* (*Musst.*) v. *Lachman Singh* (1875), 7 N. W. P. 117; *Sriramalu* v. *Ramayya* (1881), 3 Mad. 15; *Nani* (*Bai*) v. *Chunilal* (1897), 22 Bom. 973 (a case from Gujarat). See *Giriowa* v. *Bhimaji Raghunath* (1884), 9 Bom. 58, which was a case from the Southern Mahratta country, where the prohibition of the adoption of a daughter's or sister's son is not universally in force.

[8] "Dattaka Mimansa," s. 2, paras. 33, 34. See Sutherland's "Synopsis." Stokes' "Hindu Law Books," p. 665.

[9] See cases in note 7 above.

cases.[1] It is supported by Dr. Jogendronath Bhattacharya, who carries the rule to its logical conclusion, and in the case of an adoption by a woman excludes from adoption the sons of men between whom and her there could be no legal *niyoga* or appointment to raise issue.[2] This is also the opinion of Sastri Gopal Chundra Sarkar.[3]

There is no ground for holding that the adoption of a relation is limited to a particular generation.[4] No restriction as to generation.

In the Punjab no adoption is rendered invalid by any relationship between the adopting and natural parents.[5] Punjab.

Adoptions of daughter's sons, sister's sons, brother's sons, daughter's and sister's sons, by members of twice-born classes, have been upheld in the Punjab.[6]

Jains are not bound by any restrictions as to the relationship between adopter and adopted.[7]

Among Jains a daughter's son may be adopted.[8]

An adopted son cannot adopt from his adoptive family a boy whom he could not have adopted if he had been a natural son of his adoptive father.[9] Adoption from adoptive family.

An only son, or any one of several sons, can be adopted.[10] Only son.

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[1] *Battas Kuar (Musst.)* v. *Lachman Singh* (1875), 7 N. W. P. 117; *Dagumbaree Dabee* v. *Taramoney Dabee* (1818), Macnaghten's "Considerations," 170; 1 Morley's "Digest," 19. In the latter case Nanda Pandita's rule was extended to an uncle's son.

[2] "Commentaries on Hindu Law," 2nd ed., 166.

[3] "Law of Adoption," p. 332.

[4] *Haran Chunder Banerji* v. *Hurro Mohun Chuckerbutty* (1880), 6 Calc. 41, at p. 48; 6 C. L. R. 393, at p. 399. It was there contended that a brother's son's son could not be adopted, although a brother's son could be adopted.

[5] See cases referred to in Sarkar's "Law of Adoption," pp. 341, 342; Rattigan's "Digest," 7th ed., 56; *Rup Narain* v. *Gopal Devi* (1909), 36 I. A. 103; 36 Calc. 780; 13 C. W. N. 920; 10 Bom. L. R. 833.

[6] Sarkar's "Law of Adoption," pp. 341, 342.

[7] Among the Jains adoption is a mere temporal arrangement, and has no spiritual object. *Asharfi Kunwar* v. *Rup Chand* (1908), 30 All 197; S. C. on appeal *Rup Chand (Lala)* v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402; *Bhagvandas Tejmal* v. *Rajmal* (1873), 10 Bom. H. C. 241, at p. 262.

[8] *Sheo Singh Rai* v. *Dakho (Mussumat)* (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319; *Hassan Ali* v. *Naga Mal* (1876), 1 All. 288.

[9] See Sarkar's "Law of Adoption," p. 387.

[10] *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)*; *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113; 22 Mad. 398; 21 All. 460; 3 C. W. N. 427; 1 Bom. L. R. 226; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 367; 2 Bom. L. R. 163.

A widow can give her only son in adoption.[1]

There was for a long time a conflict in the Indian Courts as to whether an only son could be given in adoption,[2] but in 1899 it was definitely settled that he could be so given. The power to adopt an elder or any one of several sons was settled much earlier.[3]

Age of boy. Bengal and Benares schools.

According to the Bengal[4] and Benares[5] schools, in the case of the three higher classes the adoption must take place before the boy is invested with the sacred thread;[6] in the case of Sudras it must take place before marriage.[7]

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[1] *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542; 3 Bom. L. R. 73, where it is said, "Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied effect ceases to be operative, and no restriction can be placed on the widows' power to make a valid gift of an only son." It was not necessary to decide in *Balusu Gurulingaswami's* case whether a widow would have power to give an only son in adoption. In *Somasekhara Raja* v. *Subhadramaji* (1882), 6 Bom. 524, following *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 396, it was held that an authority by the husband to give in adoption, even as a *dvyamushyayana* (*post*, pp. 190–193), would not be implied in the case of the adoption of an only son. See also *Debee Dial* v. *Hur Hor Singh* (1828), 4 Ben. Sel. R. 320 (new edition, 407). The decision in *Krishna* v. *Paramshri* is supported by the views expressed by the Judicial Committee in *Balusu Gurulingaswami's* case, 26 I. A. at pp. 127, 128; 22 Mad. at pp. 407, 408; 21 All. at pp. 469, 470; 3 C. W. N. at pp. 436, 437; 1 Bom. L. R. 226.

[2] For a discussion of the earlier cases on this subject, see Mayne's "Hindu Law," 8th ed., pp. 185–192; and Sarkar's "Law of Adoption," pp. 298–306. For a discussion of the texts and the views of the commentators and other authorities, see Sarkar's "Law of Adoption," pp. 282–298.

[3] See *Seetaram* v. *Dhunnook Dharee Sahye* (1863), 1 Hay, 260; *Janokee Debea* v. *Gopaul Acharjea* (1877), 2 Calc. 365; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Kashibai* v. *Tatia* (1883), 7 Bom. 221.

[4] *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd ed., 270) (this was a case of Sudras); *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain*, Ben. S. D. of 1859, 229, at pp. 236, 237, affirmed on review, Ben. S. D. of 1860, vol. i. 485, at p. 490. On appeal this question did not arise (*Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1865), 10 M. I. A. 279; 3 W. R. P. C. 15). See *Kerutnaraen* v. *Bhobinesree* (*Mussummaut*) (1806), 1 Ben. Sel. R. 161, note to p. 162 (2nd ed., 213, note to p. 214). See "Dattaka Mimansa," iv. 22; "Dattaka Chandrika," ii. 25, 30 (Sutherland's note), 31. 1 W. Macnaghten, 73, note. This is disputed by G. C. Sarkar ("Law of Adoption," p. 362), who contends that the investiture in the natural family is not a bar to an adoption. As to the effect of an adoption when the ceremony of tonsure has been performed in the natural family, see *post*, p. 192.

[5] *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at p. 328. See *Rup Chand* (*Lala*) v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402.

[6] As to the age for such investiture, see Colebrooke, note to "Dattaka Mimansa," s. 4, para. 23; Colebrooke's "Digest," vol. iii. p. 104.

[7] *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd ed., 270); *Nitradaye* (*Ranee*) v. *Bholanath Doss*, Ben. S. D. A. 1853, p. 553; "Dattaka

An unmarried Sudra, of any age, who is in other respects qualified, can be adopted according to all the schools.[1] Sudras.

In the Madras Presidency the same rules apply,[2] except that a Brahmin boy of the same *gotra* [3] can be adopted after the thread ceremony has been performed, but before marriage.[4] Madras.

In Western India there is no objection to the adoption of a married man even if he has children.[5] Western India.

It has been held that a married Sudra of a different *gotra* can be adopted,[6] and the adoption of a married Brahmin of a different *gotra*, having children at the date of his adoption has been upheld.[7] When he is of the same *gotra* it follows that there can be no objection.[8]

Difference of age between boy and adopter.

The rule of Hindu law requiring a difference of age between the adoptive father or mother and the boy,[9] is apparently merely directory.[10]

If a boy, eligible in other respects, upon whom the ceremonies of *chudakarma* (tonsure) and *upanayana* (investiture with the sacred thread) have not been performed in his natural family, can be obtained, he should be preferred, but the fact that such ceremonies have been performed does not invalidate the adoption.[11]

Chandrika," ii. 29, 32; Strange's "Hindu Law," vol. i. p. 91. The adoption of a married *Ahir* was held invalid in *Jhunka Prasad* v. *Nathu* (1913), 35 All. 263.

[1] See *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384, at pp. 396, 397, in which case the Court considered that the adoption of an unmarried man of over forty years of age would not be invalid on the mere ground of age.

[2] *Pichuvayyan* v. *Subbayyan* (1889), 13 Mad. 128; *Chetty Colum Prasunna Vencatachella Reddyar* v. *Chetty Colum Moodoo Vencatachella Reddyar*, Mad. S. D. A. 1823, p. 406; *Sevagamy Nachiar* v. *Mooto Vizia Raghoonadha Satoopathy*, *ibid.* p. 101; Strange's "Hindu Law," vol. i. pp. 87–91; cases in vol. ii. at pp. 87, 102, 109, 110; *Sreenevassien* v. *Sashyummal*, Mad. Dec. of 1859, 118; *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 78. See *Vythilinga Muppanar* v. *Vijayathammal* (1882), 6 Mad. 43. As to Sudras, see *Pappamma* v. *V. Appa Rau* (1893), 16 Mad. 384, at p. 396.

[3] As to the meaning of "*gotra*," see *ante*, p. 39.

[4] *Viraragava* v. *Ramalinga* (1883), 9 Mad. 148; *Pichuvayyan* v. *Subbayyan* (1889), 13 Mad. 128. See *P. Venkantesaiya* v. *Venkata Charlu* (1866), 3 Mad. H. C. 28.

[5] *Mhalsabai* v. *Vithoba Khandappa Gulve* (1862), 7 Bom. H. C. App. xxvi. See *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (1874), 11 Bom. H. C. 190. As to the effect of the adoption upon the rights of his children, see *post*, pp. 179, 190.

[6] *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364. See also *Nathaji Krishnaji* v. *Hari Jagoji* (1871), 8 Bom. H. C. (A. C.), 67.

[7] *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80. See also *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at pp. 371, 373.

[8] See *Brijbhookunjee Muharaj* (*Sree*) v. *Gokoolootsaojee Muharaj* (*Sree*) (1816), 1 Borr. 181, at p. 195, where the adoption of a married Brahmin of 45 years of age belonging to the same *gotra* was upheld.

[9] Steele, pp. 44, 182; V. N. Mandlik, p. 471.

[10] *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250, at p. 257.

[11] *Dharma Dagu* v. *Ramkrishna Chimnaji* (1885), 10 Bom. 80; *Laksmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 370.

Punjab.

In the Punjab there is no limit of age, and the performance of the thread ceremony or of marriage in the family does not invalidate the adoption.[1]

Jains.

Among Jains there is no limit of age,[2] and a married man may be adopted.[3] In a case of Agarwala Jains,[4] who belong to the twice-born classes, the Privy Council upheld an adoption of a married man, but pointed out that the custom would have to be proved in each case.

Orphan.

An orphan, whether he be a minor or an adult, cannot be adopted.[5]

This follows from the rule that only a father or mother can give in adoption.[6]

Boy who has been previously adopted.

A boy who has been taken in adoption, cannot be taken again in adoption.[7]

As to a joint adoption by two widows, see *ante*, p. 108.

Personal defects.

Where a boy is disqualified by personal defects from inheriting, it is not settled whether he can be adopted. Apparently he cannot.[8]

A defect which would attach to the boy in consequence of a fault on the part of his parents would not operate as a disqualification.[9]

Brahmo.

There is no objection to the adoption of the Brahmo son of a Brahmo.[10]

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[1] In *Makhan* v. *Nikka*, Punjab Records of 1868, case No. 37, p. 96, the Chief Court upheld the adoption of a man of the age of 30.

[2] *Govindnath Roy* (*Maharajah*) v. *Gulal Chand* (1833), 5 Ben. Sel. R. 276 (new edition, 322); *Rithcurn Lalla* v. *Soojun Mull Lallah*, 9 Mad. Jur. 21, referred to in *Sheo Singh Rai* v. *Dakho* (*Mussumat*) (1874), 6 N. W. P. 382, at p. 402.

[3] *Manohar Lal* v. *Banarsi Das* (1907), 29 All. 495.

[4] *Rup Chand* (*Lala*) v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402.

[5] *Shrinivas Sarjerav* v. *Balwant Venkatesh* (1913), 37 Bom. 513; 15 Bom. L. R. 533; *Vaithilingam Mudali* v. *Murugaian* (1912), 37 Mad. 529; *Subbaluvammal* v. *Ammakutti Ammal* (1864), 2 Mad. H. C. 129; *Balvantrav Bhaskar* v. *Bayabai* (1869), 6 Bom. H. C. O. J. 83; *Bashetiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268. As to the custom of the Agarwal Banias of Zira, see *Chiman Lal* v. *Hari Chand* (1913), 40 I. A. 156; 40 Calc. 879; 17 C. W. N. 885; 15 Bom. L. R. 646.

[6] *Ante*, p. 136.

[7] G. C. Sarkar's "Law of Adoption," pp. 281, 282. See "Dattaka Mimansa," s. 1, para. 30; s. 2, paras. 40–47.

[8] Sutherland in his "Synopsis"; Stokes' "Hindu Law Books," p. 665, says, "It is an obvious inference that the person selected should be exempt from any disqualification, which might prevent him fulfilling the purpose of the adoption." This is supported by Nanda Pandita, "Dattaka Mimansa," s. 2, para. 62. See, however, Sarkar's "Law of Adoption," pp. 349, 350.

[9] Sarkar's "Law of Adoption," p. 350.

[10] *Kusum Kumari Roy* v. *Satyaranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784.

Simultaneous adoptions.

The simultaneous adoption of two or more sons is invalid as to all.[1]

The practice of simultaneous adoptions of two or more sons seems to have been prevalent in Bengal after 1846, and to have owed its origin to the ingenuity of Hindu lawyers, who attempted thereby to evade the effect of the decision of the Privy Council in *Rungama* v. *Atchama*,[2] in which an adoption during the lifetime of a previously adopted son was declared void.[3]

It may in some cases be difficult to determine whether the adoptions were simultaneous, and, therefore, both void, or merely successive, in which case the latter only would be void. In *Siddessory Dassee* v. *Doorga-churn Sett*,[4] Phear, J., said, "But, moreover, on that occasion, the ceremonies for the two boys were carried on, practically speaking, simultaneously, although possibly the beginnings and endings were not absolutely synchronous. If either boy was adopted, both were adopted, and it would be an outrage to common sense to say otherwise than that they were adopted at one and the same time."

In the case of adoption the test of eligibility of the adopted son for adoption must be the test which would have applied had the adoption been made by the husband himself in his lifetime.[5]

Act of Adoption.

Giving and taking necessary.

There must in every case be an actual corporeal gift and acceptance of the boy in adoption,[6] coupled with an expression of the intention of the one person to give, and of the other to accept, the boy in adoption.[7]

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[1] *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1885), 12 I. A. 198; 12 Calc. 406; S. C. in Court below, *Gyanendro Chunder Lahiri* v. *Kalla Pahar Hajee* (1882), 9 Calc. 50; 11 C. L. R. 297; *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; S. C. in Court below, *Doorgasundari Dossee* v. *Surendra Keshav Roy* (1886), 12 Calc. 686; *Siddessury Dossee* v. *Doorga Churn Sett* (1865), 2 Ind. Jur. (N. S.) 22; Bourke, O. C. 360. See also *Monemothonath Dey* v. *Onontnath Dey* (1865), 2 Ind. Jur. (N. S.) 24.

[2] (1846), 4 M. I. A. 1; 7 W. R. P. C. 57; *ante*, p. 103.

[3] See Sarkar's "Law of Adoption," p. 184.

[4] (1865), 2 Ind. Jur. (N. S.) 22; Bourke, O. C. 360.

[5] *Puttu Lal* v. *Parbati Kunwar* (*Musamaut*) (1915), 42 I. A. 155, at p. 160; 37 All. 359, at p. 366; 19 C. W. N. 841, at p. 847; 17 Bom. L. R. 549, at pp. 553, 554.

[6] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101; 19 Calc. 452; *Shosinath Ghose* (*Mahashoya*) v. *Krishna Soondari Dasi* (*Srimati*) (1880), 7 I. A. 250; 6 Calc. 381; 7 C. L. R. 313; *V. Singamma* v. *Vinjamuri Venkatacharlu* (1868), 4 Mad. H. C. 165; *Veerapermall Pillay* v. *Narrain Pillay* (1801), 1 Mad. N. C. 78.

[7] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at pp. 218, 219. See also *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at p. 7, where in referring to *Shosinath Ghose* (*Mahashoya*) v. *Krishna Soondari*

A mere gift by a document transferring the boy,[1] or a constructive gift of an absent boy,[2] or an expression of assent [3] or intention [4] without an actual gift is insufficient.

Writing unnecessary. Adoptions in Oudh.

A deed or other writing in support of the act of adoption is unnecessary,[5] but in cases to which the Oudh Estate Act, 1869,[6] applies, an adoption by a widow must be by a writing executed and attested in manner required in case of a will,[7] and registered.[8]

Invitations, etc.

Although it is usual to invite relations to the performance of the ceremonies, and, in the case of large landowners, to represent the fact of the adoption to the Government authorities, the absence of such invitation or representation does not vitiate the adoption.[9] The consent of the ruling authority is not necessary,[10] even in the case of vatandars,[11] unless it be a condition of the exercise of a permission to adopt.[12]

As to the custom of the Agarwal Banias of Zira, see *ante*, p. 148.

Dasi (*Srimati*) (1880), 7 I. A. 250; 6 Calc. 381; 7 C. L. R. 313, the Court said, "the decision is an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give, to a person competent to take, accompanied by the declaration on the one side, 'I give the child in adoption,' and on the other, 'I take the child in adoption.'" *Kenchawa* v. *Ningupa* (1866), 10 Bom. H. C. 265, note.

[1] See *Shosinath Ghose* (*Mahashoya*) v. *Krishna Soondari Dasi* (*Srimati*) (1880), 7 I. A. 250, at pp. 255, 256; 6 Calc. 381, at pp. 388, 389; 7 C. L. R. 313, at pp. 318, 319; *Sreenarain Mitter* v. *Kishen Soondory Dassee* (*Sreemutty*) (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171; S. C. *sub nomine*, *Nogendro Chundro Mittro* v. *Kishen Soondery Dossee*, 19 W. R. C. R. 133; S. C. in Court below, *Srinarayan Mitter* v. *Krishna Sundari Dasi* (*Srimati*) (1869), 2 B. L. R. A. C. 279; 11 W. R. C. R. 196; *Mandit Koer* (*Mussamat*) v. *Phool Chand Lal* (1897), 2 C. W. N. 154; *Dhapabai* v. *Champalal* (1899), 1 Bom. L. R. 842.

[2] *Siddessory Dossee* v. *Doorgachurn Selt* (1865), Bourke, O. C. 360; 2 Ind. Jur. N. S. 22.

[3] *Bashetiappa* v. *Shivlingappa* (1873), 10 Bom. H. C. 268, at p. 270; *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note; *Gourbullub* v. *Jugernatpersaud Mitter* (1823), F. Macn. Cons. H. L. 217; 1 Morley's "Digest," 18.

[4] *Banee Pershad* (*Baboo*) v. *Abdool Hye* (*Moonshee Syud*) (1876), 25 W. R. C. R. 192.

[5] *Bayabai* v. *Bala* (1866), 7 Bom. H. C. App. i., at ii.; *Sootroogun Sutputty* v. *Sabitra Dye* (1834), 2 Knapp, 287, at p. 290; 5 W. R. P. C. 109.

[6] I. of 1869.

[7] Act X. of 1865, s. 50, applied to wills under Act I. of 1869 by s. 19 of the latter Act.

[8] S. 22 (8). This would apparently not take the place of the corporeal giving and receiving required by Hindu law. See *Bhaiya Rabidat Singh* v. *Indar Kunwar* (*Maharani*) (1888), 16 I. A. 53, at p. 56; 16 Calc. 556, at p. 561.

[9] See *Alank Manjari* v. *Fakir Chand Sarcar* (1834), 5 Ben. Sel. R. 356 (new edition, 418); *Narhar Govind Kulkarni* v. *Narayan Vithal* (1877), 1 Bom. 607; *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377; *Ramchandra Vasudev* v. *Nanaji Timaji* (1870), 7 Bom. H. C. (A. C. J.) 26.

[10] *Bhasker Buchajee* v. *Narro Ragho-nath* (1826), Bom. Sel. R. 24, at p. 29; *Ramchandra Vasudev* v. *Nanaji Timaji* (1870), 7 Bom. H. C. (A. C. J.) 26; *Narhar Govind Kulkarni* v. *Narayan Vithal* (1877), 1 Bom. 607.

[11] *Balaji* v. *Datto* (1902), 4 Bom. L. R. 762.

[12] *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377.

Consideration for gift in adoption.

The person giving in adoption ought not to receive any consideration for the adoption; but it has been held that if he does so the adoption is not void.[1]

A contract to pay money in consideration of giving or receiving a son in adoption is illegal and cannot be enforced,[2] but it does not affect the validity of the adoption, unless it be certain that the adopting father or mother acted from corrupt motives alone.[3]

As to an arrangement made by a widow to reserve the property of her husband for herself, see *post*, pp. 184, 185.

Conditional gift in adoption.

Where a father gives his son in adoption, he has apparently no power to impose a condition invalidating the adoption on the happening or non-happening of a future event; but in giving to his wife permission to give in adoption, he may subject the exercise of that power to a condition, and unless that condition be substantially fulfilled the gift has no effect.[4]

If the condition be an illegal or immoral one, the gift would be effectual even though the condition be not performed.

It is by no means clear what effect upon the boy's position in his natural family would be caused by an adoption upon a condition which is not fulfilled.

As to conditions with regard to the property made at the time of the adoption, see *post*, pp. 184–186.

As to gifts of property conditional on adoption, see *post*, pp. 204, 205.

Mental capacity of giver and taker.

The person taking[5] and the person giving[6] in adoption must be mentally capable of understanding, and must

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[1] *Murugappa Chetti* v. *Nagappa Chetti* (1905), 29 Mad. 161. See *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (1874), 13 B. L. R. App. 42; 21 W. R. C. R. 381. G. C. Sarkar says ("Law of Adoption," p. 375), "In the majority of cases some sort of valuable consideration is given by the adopter to the natural father for inducing him to give away his son."

[2] See *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (1874), 13 B. L. R. App. 42; 21 W. R. C. R. 381; *Mahableshvar Fondbha* v. *Durgabai* (1896), 22 Bom. 199, at p. 206; *Sitaram Pandit (Shri)* v. *Harihar Pandit (Shri)* (1910), 35 Bom. 169; 12 Bom. L. R. 910.

[3] See *Mahableshvar Fondba* v. *Durgabai* (1896), 22 Bom. 199. Cf. *ante*, p. 102.

[4] *Rangubai* v. *Bhagirthibai* (1877), 2 Bom. 377. In this case the previous sanction of Government was the condition required by the natural father.

[5] *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429 (see this case as to an adoption by a person *in extremis*); *Bullabakant Chowdree* v. *Kishenprea Dassea Chowdrain* (1838), 6 Ben. Sel. R. 219 (2nd edition, 270); *Mandit Koer (Mussammat)* v. *Phool Chand Lal* (1897), 2 C. W. N. 154, at p. 156.

[6] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101, at pp. 105, 106; 19 Calc. 452, at p. 461.

understand the significance of the act, otherwise there is no valid gift or acceptance, as the case may be.

There may be a question as to whether the amount of mental capacity which is requisite in the case of a will [1] is necessary for the taking a child in adoption,[2] as the taking in adoption is a matter of religious necessity.[3]

Fraud, etc.

It has been held that if an adoption has been brought about by fraud, coercion,[4] mistake,[5] misrepresentation,[6] undue influence,[7] or otherwise than by the free consent of the persons giving and taking in adoption, it is voidable, and that it can be ratified subsequently if no one's interest is prejudicially affected by such ratification.[8]

It is, however, submitted that in case of such fraud, etc., the adoption is void, and is incapable of ratification. It is submitted that the validity of an adoption must be determined at the time, and cannot depend upon future events.[9] Otherwise the position of the adopted son and his relation to his natural and to his adoptive family would remain in suspense.[10] In every case the interests of some of the adoptive relations may be prejudicially affected by an adoption. The interests of the natural relations would be affected, but not prejudicially. The question is one of status, not of contract, and is not affected by considerations which are available in cases of contract.

Where the adopter is a young widow, the Court will require clear evidence that, at the time of adoption, she was fully informed of her rights, and of the effect of adoption.[11] There may, however, be some relaxation of the strictness of this rule where the husband has directed his wife to adopt.[12]

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[1] See Phillips and Trevelyan's "Hindu Wills," 2nd ed., pp. 12–15.

[2] *Banee Pershad (Baboo)* v. *Abdool Hye (Moonshee Syud)* (1876), 25 W. R. C. R. 192, at p. 195.

[3] *Ante*, p. 101.

[4] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at pp. 220 to 224. See Sarkar's "Law of Adoption," pp. 205, 431.

[5] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

[6] See *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi., xxiii.

[7] *Somasekhara Raja* v. *Subhadramaji* (1882), 6 Bom. 524. See *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

[8] *Venkata Narasimha Appa Row (Sri Rajah)* v. *Rangayya Appa Row (Sri Rajah)* (1905), 29 Mad. 437. The question did not arise on appeal: *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (1913), 41 I. A. 51; 37 Mad. 199; 18 C. W. N. 554; 16 Bom. L. R. 328.

[9] See *Kovvidi Sattiraju* v. *Pattamsetti Venkataswami* (1916), 32 Mad. L. J. 119.

[10] Cf. *post*, p. 156.

[11] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi. See *Tayammaul* v. *Sashachella Naiker* (1865), 10 M. I. A., at p. 433. There have been a number of cases in which it has been held that if it is sought to make a purdahnashin woman responsible for acts which are detrimental to her interests, it must be clearly shown that she knew the effect of such acts, and that no advantage was taken of her: see *post*, p. 511.

[12] *Bayabai* v. *Bala* (1866), 7 Bom. H. C., App. i., at pp. xx., xxi.

As to allegation and proof of fraud, see *Bal Gangadhar Tilak* v. *Shri Shrinivas Pandit* (1915), 42 I. A. 135; 39 Bom. 441; 19 C. W. N. 729; 17 Bom. L. R. 527.

Where a person who has attained the age of majority [1] is adopted, his assent would be essential to the adoption. In other cases no such assent is necessary.[2] Assent of person adopted.

In the case of Sudras no religious ceremonies are necessary.[3] Religious ceremonies. Sudras.

An intentional omission to perform even unnecessary ceremonies, with a view to leave the adoption unfinished,[4] or a non-performance of contemplated ceremonies in consequence of death, or of some other cause, may be evidence to show that the adoption is incomplete.

Except in the Punjab,[5] and amongst Jains,[6] the performance of the *datta homam* [7] is apparently necessary in the case of the twice-born classes, where the boy is not of the same *gotra* as the adoptive father. Twice-born classes.

No ceremonies are necessary in an adoption in the *dvyamushyayana* form among the Nambudri Brahmins.[8]

Where the boy is of the same *gotra* as the adoptive father Boy of same *gotra*.

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[1] *I.e.* the age of majority according to Hindu law, *ante*, pp. 46, 47. As to cases where the adoption of majors is possible, see *ante*, pp. 147, 148.

[2] Sarkar's "Law of Adoption," pp. 280, 281. In Strange's "Hindu Law," vol. i. p. 88, it is said that "the adopted son must consent," but the authority there given (*Kullean Sing* v. *Kirpa Sing* (1795), 1 Ben. Sel. R. 9 (2nd ed., p. 11)) was the case of a *Kritrima* adoption, where the consent of the person adopted would always be necessary, *post*, p. 159.

[3] *Shosinath Ghose* (*Mahashoya*) v. *Krishna Soondari Dasi* (*Srimati*) (1880), 7 I. A. 250, at p. 255; 6 Calc. 381, at p. 388; 7 C. L. R. 313, at p. 319; *Indromoni Chowdhrani* v. *Beharilal Mullick* (1879), 7 I. A. 24; 5 Calc. 770; 6 C. L. R. 183. See *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at p. 6; *Thangathanni* v. *Ramu Mudali* (1882), 5 Mad. 358; *Atmaram* v. *Madho Rao* (1884), 6 All. 276, at p. 281; *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 393, 394; *Nittianand Ghose* v. *Krishna Dyal Ghose* (1871), 7 B. L. R. 1; 15 W. R. C. R. 300; *Perkash Chunder Roy* v. *Dhunmonee Dassea*, Ben. S. D. A. 1853, p. 96.

[4] *Banee Pershad* (*Baboo*) v. *Abdool Hye* (*Moonshee Syud*) (1876), 25 W. R. C. R. 192, at p. 198; *Valubhai* v. *Govind Kashinath* (1899), 24 Bom. 218, at pp. 226, 227; 1 Bom. L. R. 770. See *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1916), 20 C. W. N. 901.

[5] Tupper's "Punjab Customary Law," vol. iii. p. 82.

[6] *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319; see *Rup Chand* (*Lala*) v. *Jambu Parshad* (1910), 37 I. A. 93; 32 All. 247; 14 C. W. N. 545; 12 Bom. L. R. 402. As to the rites which are usual among Jains, see Sarkar's "Law of Adoption," p. 454.

[7] Oblations of clarified butter to fire, Wilson's "Glossary."

[8] *Shankaran* v. *Kesavan* (1891), 15 Mad. 6. As to this form of adoption, see *post*, pp. 190–193.

as, for instance, where he is a brother's son, no religious ceremonies are necessary.[1]

There is not very much direct authority on the question whether the absence of religious ceremonies in any case invalidates an adoption among the twice-born classes. In an old case the Judicial Committee said,[2] "Although neither written acknowledgments nor the performance of any religious ceremonials are essential to the validity of adoptions;" but it does not appear that the question as to the necessity of religious ceremonies was raised in that case.

In reference to these remarks the Judicial Committee said in a subsequent case,[3] "It cannot, however, be considered as more than a *dictum*, since the decision was against the adoption in fact."

In a still later case, where the parties were Sudras, the Judicial Committee said,[4] "It is perfectly clear that amongst the twice-born classes there would be no such adoption by deed, because certain religious ceremonies, the *datta homam* in particular, are in their case requisite."

Although it has been considered that this expression of opinion decides the question,[5] "it is doubtful if more was intended than to point out that such religious ceremonies are requisite as part of the purely ceremonial law, not that the validity of an adoption for civil purposes depends on their due observance."[6] At any rate, so far as the Judicial Committee is concerned, there are only contradictory *dicta* on the subject.

The High Courts have accepted the view that the performance of the *datta homam* is necessary,[7] but in one case only[8] has a High Court, so far

[1] *Valubai* v. *Govind Kashinath* (1899), 24 Bom. 218; 1 Bom. L. R. 770, approved of by the Privy Council in *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (*Shri*) (1915), 42 I. A. 135; 39 Bom. 441; 19 C. W. N. 729; 17 Bom. L. R. 527; *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, preferring on this point *Singamma* v. *Vinjamuri Venkatacharlu* (1868), 4 Mad. H. C. 165, to *Venkata* v. *Subhadra* (1884), 7 Mad. 548; *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 219; *Atmaram* v. *Madho Rao* (1884), 6 All. 276; *Retki* v. *Lak Pati Pujari* (1914), 20 C. W. N. 19. See *Huebut Rao Mankur* v. *Govind Rao Bulwant Rao Mankur* (1820), 2 Borr. 75, at pp. 85, 87.

[2] *Sootroogun Sutputhy* v. *Sabitra Dhye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109.

[3] *Indromoni Chowdhrani* v. *Beharilal Mullick* (1879), 7 I. A. 24, at p. 36; 5 Calc. 770, at p. 774; 6 C. L. R. 183, at p. 191.

[4] *Shosinath Ghose* (*Mohashoya*) v. *Krishna Soondari Dasi* (1880), 7 I. A. 250, at p. 256; 6 Calc. 381, at pp. 388, 389; 7 C. L. R. 313, at p. 319.

[5] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 220. The parties in this case were Vaisyas, but as there was no effective giving or taking, the decision of this question was not necessary.

[6] *Atma Ram* v. *Madho Rao* (1884), 6 All. 276, at p. 283.

[7] *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 124, at p. 220; *Venkata* v. *Subhadra* (1884), 7 Mad. 548; *Govindayyar* v. *Dorasami* (1887), 11 Mad. 5, at pp. 9, 10; *Chandramala Patta Mahadevi* (*Sri Sri*) v. *Muktumala Patta Mahadevi* (*Sri*) (1882), 6 Mad. 20; *Atmaram* v. *Madho Rao* (1884), 6 All. 276; *Oomrao Singh* (*Thakoor* v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra H. C. 103A. See *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 393, 394; "Dattaka Mimansa," v. 36; West and Bühler, 922, 923; Steele, 45.

[8] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *post*, p. 155, note 8.

as the writer can ascertain, set aside an adoption on the ground that religious ceremonies had not been performed.

Adoption by twice-born females.

It has been suggested [1] that adoption by a widow perhaps stands on a different footing, as, "according to the sages, the twice-born females hold the same position as Sudras with respect to the performance of religious ceremonies," but this distinction is not made by the cases which hold that religious ceremonies are necessary in the case of an adoption in one of the regenerate classes. In some of those cases [2] the adoption was made by a widow.

Time of performance of *homa.*

The *homa* ceremony may be performed at any time after the actual giving and taking, and it does not seem to be necessary that the father should perform it. Its performance after the death of the natural father,[3] or of the adoptive father,[4] does not invalidate the adoption. When the *homa* is necessary, the adoption is not complete until it is performed.

Place of performance.

Although it is usual to perform the *homa* in the dwelling-house of the adopter,[5] it is immaterial where the ceremony is performed.[6]

Delegation of performance of religious ceremonies.

There seems to be nothing to prevent the natural and adoptive parents delegating to others the performance of the *homa* ceremony.[7]

Other religious ceremonies.

Although other religious ceremonies may be usual, it does not appear that the absence of them invalidates an adoption.[8]

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[1] Sarkar, "Law of Adoption," p. 381. See "Dattaka Mimansa," s. 1, para. 27; "Vyavahara Mayukha," s. 1, para. 15.

[2] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381; *Atmaram* v. *Madho Rao* (1884), 6 All. 276; *Oomrao Singh (Thakoor)* v. *Mehtab Koonwer (Thakooranee)* (1868), 3 Agra H. C. R. 103A.

[3] *Venkata* v. *Subhadra* (1884), 7 Mad. 549. In this case five years had elapsed. In the interval the natural father died, but the *homa* was performed by one of his sons.

[4] *Subbarayar* v. *Subbammal* (1898), 21 Mad. 497; S. C. on appeal (1900), 27 I. A. 162; 24 Mad. 214; 4 C. W. N. 304; 2 Bom. L. R. 982.

[5] Sarkar's "Law of Adoption," pp. 382, 383.

[6] *Oomrao Singh (Thakoor)* v. *Mehtab Koonwer (Thakooranee)* (1868), 3 Agra H. C. 103A.

[7] See *Subbarayar* v. *Subbammal* (1898), 21 Mad. 497; *Lakshmibai* v. *Ramchandra* (1896), 22 Bom. 590. As to the delegation of the giving and receiving, see *ante*, pp. 132, 136.

[8] In *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179, the Court held that the performance of the *putresti jag* (sacrifice for male issue) is essential to the validity of an adoption among the three superior castes. G. C. Sarkar ("Law of Adoption," p. 383) suggests that the words "*putresti jag*" were in the judgment in that case by mistake substituted for "*datta homam*," as the *putresti jag* is only necessary when the ceremony of tonsure has been performed in the natural family ("Dattaka Mimansa," s. 4, paras. 32, 49).

Requirements of valid adoption.

Provided the above rules as to the capacity to take in adoption, the capacity to give in adoption, the capacity to be taken in adoption, and as to the act of adoption, are followed, an adoption is valid; otherwise it is void.[1]

Subsequent event.

The invalidity of an adoption, or of a power to adopt, cannot be cured by a subsequent event.[2]

Illustrations.

(*a*) An adoption made during the lifetime of a son is not rendered valid by the death of such son.[3]

(*b*) A power to adopt a son as co-heir to a living son cannot be exercised even after the death of the living son.[4]

(*c*) The death of the son's widow, in whom the property has vested, does not validate an adoption made before her death.[5]

Consent does not validate adoption.

Except in so far as the law in certain cases requires the consent of kinsmen for the purpose of validating an adoption,[6] the consent of the person in whom the estate of the adoptive father is vested, or of the person or persons entitled in reversion, does not validate an adoption which is otherwise invalid.[7]

It has been held in Bombay that where the adoption takes place with the full consent of the person in whom the estate is vested by inheritance, even when such person has only a limited estate such as that of a mother, the adoption is rendered valid, and the estate vested in the adopted son by

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[1] See *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 296, 297. As to the application of the doctrine *factum valet quod fieri not debuit*, see *ibid.*; *Gurulingaswami (Sri Balusu)* v. *Ramalaksmamma (Sri Balusu)*; *Radha Mohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 144; 22 Mad. 398, at p. 423; 21 All. 460, at p. 487; 3 C. W. N. 427, at p. 448; 1 Bom. L. R. 226; *Uma Deyi (Srimati)* v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 53; 3 Calc. 587, at p. 601; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 398; *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1879), 3 Bom. 273, at p. 293; *Dharma Dagu* v. *Ram Krishna Chimnaji* (1885), 10 Bom. 80, at p. 86.

[2] See *Kowidi Sattiraju* v. *Pattamsetti Venkataswami* (1916), 32 Mad. L. J. 119. As to the postponement of the religious ceremonies, see *ante*, p. 155.

[3] *Basoo Camumah* v. *Basoo Chinna Vencatasa*, Mad. S. D. A. 1856, p. 20; *Veraprashyia* v. *Santauraja*, Mad. S. D. A., 1860, p. 168.

[4] *Joy Chundro Raee* v. *Bhyrub Chundro Raee*, Ben. S. D. A. 1849, 461.

[5] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302.

[6] *Ante*, pp. 120–126.

[7] *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108, at p. 112; *Mohendrololl Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 43; *Adivi Surya Prakasa Rao* v. *Nidamarty Gangaraju* (1909), 33 Mad. 228. See *Anandibai* v. *Kashibai* (1904), 28 Bom. 461, at p. 465; 6 Bom. L. R. 464.

such consent;[1] but there is authority to the contrary to be found in decisions of the same Court.[2]

It is submitted, that although the consent may have the effect of estopping the person consenting from denying the adoption,[3] and thereby divesting the estate, it cannot otherwise affect the validity of the adoption as for example it cannot affect the inheritance by or to collaterals.

As to the consent of a son to an adoption by his father, see *ante*, pp. 105, 106.

As to consent to the devesting of estates on adoption, see *post*, p. 197.

As to estoppel and acquiescence, see *post*, pp. 172, 173.

Cancellation or Renunciation.

An adoption once validly made cannot be cancelled by the natural or adoptive parents,[4] or renounced by the adopted son.[5]

There is nothing to prevent an adopted son renouncing any interest in property which would come to him as such.[6]

KRITRIMA FORM OF ADOPTION.

Adoption in *Kritrima* form.

In the district of Mithila, or Tirhoot,[7] where it is the prevailing form,[8] and in the adjoining districts,[9] a form of adoption called the *Kritrima* [10] is practised, and is recognized by the law.

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[1] *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327, at pp. 331, 332; *Siddappa* v. *Ningangavda* (1914), 38 Bom. 724; 16 Bom. L. R. 663; *Babu Amaji* v. *Ratnoji Krishnarav* (1895), 21 Bom. 319; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Rupchand Hindumal* v. *Rukhmabai* (1871), 8 Bom. H. C. A. C. J. 114, at p. 122. From any point of view the consent of a minor is not sufficient to validate an adoption; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551.

[2] See *Dharnidhar (Shri)* v. *Chinto* (1895), 20 Bom. 250, at p. 258; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551, at p. 555; *Bharmawa* v. *Sangappa* (1900), 2 Bom. L. R. 628; *Anandibai* v. *Kashibai* (1904), 28 Bom. 461, at p. 465; 6 Bom. L. R. 464.

[3] *Post*, p. 172.

[4] Colebrooke's "Digest," vol. ii. p. 111; Strange's "Hindu Law," vol. ii. p. 108; *Sukhbasi Lal* v. *Guman Singh* (1879), 2 All. 366; *Huebut Rao Mankur* v. *Govind Rao Bulwant Rao Mankur* (1823), 2 Borr. 75.

[5] *Mahadu Ganu* v. *Bayaji Sidu* (1893), 19 Bom. 239; *Ruvee Bhudr* v. *Roopshunker Shunkerjee* (1823), 2 Borr. 656, at pp. 665, 671.

[6] *Post*, p. 188.

[7] See *ante*, p. 14.

[8] *Kullean Sing* v. *Kirpa Sing* (1795), 1 Ben. Sel. R. 4 (new edition, 11); *Sutputtee (Mussummaut)* v. *Indranund Jha* (1816), 2 Ben. Sel. R. 173, note to p. 175 (new edition, 221, note to p. 224); Colebrooke's "Digest," vol. iii. p. 276; Strange's "Hindu Law," vol. ii. p. 204. There is nothing to prevent a *dattaka* adoption in the Mithila district by a man; Sarkar's "Law of Adoption," p. 447; but a widow cannot adopt in that form according to the Mithila school.

[9] Sarkar's "Law of Adoption," p. 448. In a note to *Srinath Serma* v. *Radhakaunt* (1796), 1 Ben. Sel. R. 15, at p. 16 (new edition, 19, at p. 21), it is said that this form of adoption "is in use in North Behar, and the contiguous districts of Baglipore (Bhaughulpore) and Purnea."

[10] Factitious. *Kritrima putra* means the son made, Wilson's "Glossary," p. 297.

This form of adoption is not to be confounded with the adoption of a *Kritrima* son according to the Smritis and commentaries. The latter held the same position as a *Dattaka* son, and the ceremonies and conditions were apparently identical in both cases. The *Kritrima* form of adoption which in ancient times prevailed throughout India has long been obsolete.

The modern form of *Kritrima* adoption is based upon recent authorities, and is said to owe its origin to the prohibition [1] of adoption by a widow in the Mithila country.[2]

Who can adopt.

Either a man or a woman can adopt in this form, provided he or she has no son,[3] grandson, or great grandson in existence.

A wife or widow so adopting does not require the assent of her husband or of his kinsmen.[4] She cannot adopt a son to her husband in this form, even if she receives his permission.[5]

A husband and wife can adopt jointly, or they may each adopt a separate son under this form.[6]

Who may be adopted.

Except that he must belong to the same class [7] as the person adopting him, there is no restriction as to the person to be adopted.[8]

Relationship.

The relationship of the adopter and the adopted does not, it is submitted, affect the validity of the adoption.

In *Purmessur Dutt Jha (Chowdree)* v. *Hunooman Dutt Roy*,[9] the adoption of a sister's son by a Brahmin in the *Kritrima* form was upheld, but in an earlier case,[10] the adoption of an elder brother by a younger brother was held invalid.

In *Nunkoo Singh* v. *Purm Dhun Singh*,[11] an adoption of a sister's son in the *Kritrima* form was upheld, but on the ground that the parties did not belong to one of the regenerate classes.

According to the Dvaita-Parishishta of Kesaba Misra, a pundit of Mithila, even a father or a brother may be adopted.[12]

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[1] *Ante*, p. 126.

[2] W. Macnaghten's "Hindu Law," vol. i. pp. 95–100.

[3] Sarkar's "Law of Adoption," p. 449.

[4] W. Macnaghten's "Hindu Law," vol. ii. pp. 195, 196. *Shibkoeree (Mussamut)* v. *Joogun Singh* (1867), 8 W. R. C. R. 155, at p. 157; *Collector of Tirhoot* v. *Huropershad Mohunt* (1867), 7 W. R. C. R. 500.

[5] See answers of pundits in *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at pp. 34, 35).

[6] See *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); 1 W. Macn. 101.

[7] See *ante*, pp. 22, 23, 138.

[8] *Purmessur Dutt Jha (Chowdree)* v. *Hunooman Dutt Roy* (1837), 6 Ben. Sel. R. 192 (new edition, 235, at p. 246); 1 Macnaghten's "Hindu Law," pp. 75, 76.

[9] (1837), 6 Ben. Sel. R. 192 (new edition, p. 235).

[10] *Runjeet Sing (Baboo)* v. *Obhye Narain Sing (Baboo)* (1817), 2 Ben. Sel. R. 245 (new edition, 315). Sir Wm. Macnaghten points out ("Hindu Law," vol. i. p. 76, n.) that the authorities cited by the law officers in that case had relation to the *Dattaka* form of adoption.

[11] (1869), 12 W. R. C. R. 356.

[12] *Ooman Dutt* v. *Kunhia Singh* (1822), 3 Ben. Sel. R. 145, at p. 149 (new edition, 192, at p. 199).

Sir William Macnaghten considers that there is no restriction except as to tribe,[1] but Sastri G. C. Sarkar [2] contends that the rule as to relationship applicable to an adoption in the *Dattaka* form [3] are equally applicable to an adoption in the *Kritrima* form.

Age.

The age of the son adopted in this form is immaterial.[4]

The performance of the initiatory ceremonies in the natural family,[5] or the marriage,[6] does not prevent the adoption.

Consent.

The consent of the adopted son,[7] and the consent (or at any rate the absence of the express dissent) of his parents, if living, is necessary to this form of adoption, when he is a minor.[8]

The relationship being one created by contract, the consent of all the necessary parties must synchronise. An assent given by the son after the death of the adoptive father to an adoption to which the adoptive father assented before his death will not be sufficient.[9]

Ceremonies.

No ceremonies are necessary,[10] and no particular form is required to be observed.

Colebrooke [11] cites from "Rudradhara in the Suddhiviveka," the following :—

"The form to be observed is this. At an auspicious time, the adopter of a son having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says, 'Be my son.' He replies, 'I am become thy son.' The giving of some chattel arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential." [12]

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[1] *I.e.* caste or class, "Hindu Law," vol. i. pp. 75, 76.

[2] "Law of Adoption," p. 339, "Dattaka Mimansa," s. 5, paras. 47–56.

[3] *Ante*, pp. 138–144.

[4] *Shibkoeree (Mussamut)* v. *Joogun Singh* (1867), 8 W. R. C. R. 155, at p. 158; *Ooman Dutt* v. *Kunhia Singh* (1822), 3 Ben. Sel. R. 145 (new edition, 192, at p. 197).

[5] W. Macnaghten's "Hindu Law," vol. ii. p. 196. "Initiation into the family of the adopter is not practised" in this form of adoption, Strange's "Hindu Law," vol. ii. p. 204.

[6] W. Macnaghten's "Hindu Law," vol. i. p. 76.

[7] *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179, at p. 180; *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271 (new edition, p. 340); Sutherland's "Synopsis," 673; W. Macnaghten's "Hindu Law," vol. ii. p. 196.

[8] W. Macnaghten's "Hindu Law," ii. 196.

[9] *Sutputtee (Mussumat)* v. *Indranund Jha* (1816), 2 Ben. Sel. R. 137 (new edition, 221).

[10] *Shibkoeree (Mussumat)* v. *Joogun Singh* (1867), 8 W. R. 155, at p. 158.

[11] "Mitakshara," chap. i. s. 11, para. 17, note.

[12] Referred to in *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271, at p. 273 (new edition, 340, at p. 342). See *Kullean Sing* v. *Kirpa Sing* (1795), 1 Ben. Sel. R. 9 (new edition, 11, at p. 12). W. Macnaghten's "Hindu Law," vol. i. p. 98.

A *Kritrima* adoption, when once validly made, cannot be revoked.[1]

SOME OTHER SPECIAL AND LOCAL FORMS OF ADOPTION.

Gyawals

In the district of Gya there is amongst the Gyawal Brahmins a practice of adoption in a form which is similar to the *Kritrima* form. It is purely contractual, and does not affect the position of the adopted son in his natural family.[2]

Illatom adoption.

Among the Reddi caste [3] it is customary for a man who has no son [4] to affiliate a son-in-law by what is called an *Illatom* [5] adoption.

This custom prevails in the Bellary, Kurnool, Cuddapah, Nellore, and North and South Arcot districts,[6] but not among the Kondarazu caste of the Vizagapatam district.[7] There is no mention of this form of adoption in the Digests, and there are few decided cases on the subject.[8] It is necessary to determine each case according to the evidence as to the custom, and its effects, which may be brought forward.[9]

It is uncertain whether a man having a son can affiliate a son-in-law in this form of adoption, whether the affiliation is effected by the introduction into the family, or requires for its completion marriage with a daughter, and whether, if the father be dead, the right may be exercised by a surviving paternal grandfather.[10]

Effect of *illatom* adoption.

A son-in-law so adopted stands for purposes of inheritance in the place of a son, and in competition with natural born sons,[11] or sons adopted in the *Dattaka* form,[12] takes an equal share.

Inheritance.

He does not lose any of his rights of inheritance in his natural family,[13] nor do the members of his natural family lose their rights of succession to him.[14]

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[1] W. Macnaghten's "Hindu Law," vol. ii. p. 196.

[2] See *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Calc. 609; *Luchmun Lall* v. *Mohun Lall Bhaya Gayal* (1871), 16 W. R. C. R. 179; *Lachmi Dai Mohutain (Musst.)* v. *Kissen Lall Pahari Mahaton Gayal* (1906), 11 C. W. N. 147.

[3] The principal caste of Telinga cultivators, a caste of Sudras, Wilson's "Glossary," p. 442.

[4] See *Yachereddy Chinna Bassavapa* v. *Yachereddy Gowdapa* (1835), 5 W. R. P. C. 114.

[5] *Illata*, a bride's father having no son, and adopting his son-in-law, Wilson's "Glossary," p. 216.

[6] *Balarami Reddi (Sivada)* v. *Pera Reddi (Sivada)* (1883), 6 Mad. 267, at p. 269. See also *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272.

[7] *Narasimha Razu* v. *Veerabhadra Razu* (1893), 17 Mad. 287.

[8] See *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 275; *Tayumana Reddi* v. *Perumal Reddi* (1862), 1 Mad. H. C. 51.

[9] See *Chinna Obayya* v. *Sura Reddi* (1897), 21 Mad 226; *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, at p. 50.

[10] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at pp. 282, 283.

[11] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 283. This places him in a better position than a *Dattaka* son, see *post*, pp. 187, 188.

[12] See *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114, at p. 116.

[13] *Balarami Reddi (Sivada)* v. *Pera Reddi (Sivada)* (1883), 6 Mad. 267.

[14] *Ramakristna* v. *Subbakka* (1889), 12 Mad. 442.

Disposal.

An *illatom* son-in-law can deal with property acquired by him, as such, in the same way as he can deal with any other self-acquired property. His sons have no right therein by virtue of their birth.[1]

Heirs.

The property received by the *illatom* son-in-law, as such, passes to his heirs in the same way as self-acquired property.[2] The heirs of the adopter have no right in it.

Right to partition. Right of survivorship.

It is uncertain whether a son-in-law so adopted obtains a right to insist upon partition of ancestral property during the father's lifetime.[3] He apparently cannot do so, as it has been held that there is no right of survivorship between him and an adopted son living in commensality with him,[4] and the interest acquired by the *illatom* son-in-law is to be treated as self-acquired property.[5]

The taking of a son-in-law in *illatom* adoption does not prevent the subsequent adoption of a *Dattaka* son.[6]

Malabar law, Marumakkathayam system.

In Nair families governed by the *Marumakkathayam* rule of inheritance, the right (and perhaps duty) to adopt females into the family or *taravad* is vested in the *karnavan*, or head of a family, but he cannot, except in the case of custom or where it is essential to the preservation of the *taravad*, adopt without consulting the co-sharers.[7] It cannot be so essential until the last possible *karnavan* has been reached.

Under the *Aliyasanta* system the last female member of the family cannot adopt a daughter without the consent of her son.[8]

As to the adoption by Nambudri Brahmins following this law, see *Subramanyan* v. *Paramaswaran* (1887), 11 Mad. 116.

As to the law of adoption in Malabar, see Moore's "Malabar Law and Customs."

Makkatayam system.

In families governed by the *Makkatayam*[9] rule of inheritance, there are three systems of adoption.[10]

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[1] *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 7 Mad. H. C. 25.

[2] *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114; *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 1 Mad. H. C. 25; *Ramakristna* v. *Subbakka* (1889), 12 Mad. 442. See *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, at p. 50.

[3] *Hanumantamma* v. *Rami Reddi* (1881), 4 Mad. 272, at p. 283. Like other questions as to the incidents of this form of adoption this question must be determined on evidence of custom, *Chinna Obayya* v. *Sura Reddi* (1897), 21 Mad. 226.

[4] *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114. In *Malla Reddi* v. *Padmamma* (1893), 17 Mad. 48, the Court on the evidence decided against a claim of survivorship made by a male member of the family against the daughters of the son of an *illatom* son-in-law.

[5] Above.

[6] This was done in *Chenchamma* v. *Subbaya* (1885), 9 Mad. 114, at p. 115.

[7] *Thiruthipalli Raman Menon* v. *Variangattil Palisseri Raman Menon* (1900), 27 I. A. 231; 24 Mad. 73; 4 C. W. N. 810, citing Strange's "Manual," s. 403, which is as follows: "On failure of the sister's progeny, male and female, the head of the family may make adoption. The descent being in the female line, the adoption must be of a female. In view of the probable minority of her offspring at the period when the management may fall in, a male, her brother, may be taken in adoption at the same time with herself, in order to afford provision for the administration of the affairs of the family, and for conduct of the religious rites to be observed therein."

[8] *Chandu* v. *Subba* (1889), 13 Mad. 209; *Cotay Hegaday* v. *Manjoo Kumpty*, Mad. S. D. A. 1859, p. 138.

[9] Inheritance by the male line, Wilson's "Glossary," p. 587.

[10] "Travancore Census of 1891,"

(*a*) "In the first, ten hands or five persons take part, viz. the adopting parents,[1] the natural parents, and the boy."

Wigram says that this form is probably almost identical with the ordinary Hindu adoption.[2] It is called *pattukayyal dattu.*[3]

(*b*) Adoption by *Chamatha, i.e.* by burning a piece of sacred grass.[4]

(*c*) The third form is akin to the *Kritrima* form. It is "commonly adopted by Brahmin widows and Sudras for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same *vamsham* or tribe as the adopter. Among Sudras the adoption should be of one or more females, but it is frequently accompanied by the adoption of a male for the purpose of providing for the future management of the adopter's property. Sometimes a whole family of adults is adopted." [5]

Nambudris.

The practice among Nambudris, that only the eldest marries, necessarily limits the right of adoption to his line.[6] "But if there is any male relative at all, however distant, then he is not entitled to the right of adopting. The nearest and oldest relative must be made to marry, and thus preserve the family continuity. But if there should be no prospect of his brothers getting issue, and if they should give their consent to the act, then he may have recourse to an adoption, to which the consent of the other relatives is not necessary. If, however, he adopts one of his distant relatives, in that case the consent of all his other relations, however distant, will be necessary." [7]

Among the Nambudri Brahmins,[8] a widow can adopt or appoint an heir in order to perpetuate her *illam,*[9] in the absence of *dayadies,*[10] whose relationship is the cause of two or three days' pollution,[11] or with their consent.[12] It is usual, but apparently not indispensable in such case, to require the person so adopted or appointed to marry for the purpose of continuing the *illam.*[13] There is, apparently, no limit of age.[14]

There seems also to have been, or to be, a custom that if a Nambudri widow directs a person to marry to raise up issue for her *illam,* the status

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p. 686; Wigram's "Malabar Law and Custom," p. 4.

[1] Wigram's "Malabar Law and Custom," p. 4.

[2] *Ibid.*

[3] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 174.

[4] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 182. "Travancore Census of 1891," p. 685.

[5] Wigram's "Malabar Law and Custom," pp. 4, 5.

[6] Mayne's "Hindu Law," 8th ed., p. 274.

[7] "Travancore Census, 1891," p. 685. See Wigram's "Malabar Law and Custom," pp. 13–15. As to the general law of the Nambudris, see *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157.

[8] As to Nambudri Brahmins who follow the Marumakkathayam system, see *Subramanyan* v. *Paramaswaran* (1887), 11 Mad. 116.

[9] A family.

[10] Kinsmen.

[11] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 188. There is no substantial distinction between the power to make a *Kritrima* adoption (*ante*, pp. 157–160) and the power to appoint an heir, *ibid.*, at p. 174. See also p. 189.

[12] *Keshavan* v. *Vasudevan* (1884), 7 Mad. 297.

[13] See *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 189.

[14] *Keshavan* v. *Vasudevan* (1884), 7 Mad. 297, at p. 290.

of the son in the *illam* for which he is begotten, is that of a son obtained in gift by adoption.[1]

Adoption of daughters by dancing-girls and prostitutes.

It is unsettled whether the Courts will recognize the common practice of dancing-girls and prostitutes to adopt daughters, but except where the child has been taken in such a way as to make her reception punishable by the Criminal law, it is submitted that there is no reason why the Courts should not give effect to such usage.[2]

In cases of adoption, prior to the coming into force of the Indian Penal Code,[3] the Courts in Madras recognized the custom,[4] but declined to extend it by allowing a plurality of adoptions.[5] It was also held that no ceremonies were necessary, and that mere recognition was sufficient.[6] Apparently the adoptive mother cannot adopt if she has a daughter. It is immaterial whether she has a son.[7]

In an old case in Bengal [8] the Court declined to recognize such adoptions, and in a Bombay case,[9] the report of which does not show when the adoption took place, but where apparently it had taken place before the coming into force of the Indian Penal Code, the Court, in declining to recognize the adoption, gave reasons which are as applicable to cases before that Act came into force as thereafter.

In a later Bombay case, effect was given to an adoption effected by a dying prostitute for the purpose of providing for the performance of her funeral ceremonies, and the inheritance of her property.[10]

In cases where a minor under the age of sixteen years has been sold or otherwise disposed of, or received with intent that she shall be employed or used for the purpose of prostitution (and this generally happens in the cases of so-called adoptions by dancing-girls or prostitutes),[11] the disposal or reception of the girl is punishable by the Penal Code,[12] and therefore, as being prohibited by law, no effect can be given to it by the Court.[13]

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[1] *Tottakara Alluttar Manakal Narrain Nambudripad* v. *Puvally Manikal Trivikrama Nambudripad*, Mad. S. D. A. 1855, p. 125, referred to in *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 175, 176.

[2] See *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 495; 4 Bom. L. R. 116. See *ante*, p. 31.

[3] Act XLV. of 1860, which came into force on the 1st of May, 1861.

[4] See *Venkatachellum* v. *Venkataswamy*, Mad. dec. of 1856, p. 65; *Venku* v. *Mahalinga* (1888), 11 Mad. 393; *Muttukannu* v. *Paramasami* (1888), 12 Mad. 214; *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1864), 2 Mad. H. C. 56; Steele, 185, 186; Strange's "Manual," paras. 98, 99.

[5] *Venku* v. *Mahalinga* (1888), 11 Mad. 393; *Muttukannu* v. *Paramasami* (1888), 12 Mad. 214.

[6] *Venkatachellum* v. *Venkataswamy*, Mad. dec. of 1856, p. 65.

[7] Strange's "Manual," para. 99.

[8] *Hencower Bye* (*Doe dem*) v. *Hanscower Bye* (1818), 2 Morl. Dig. 133.

[9] *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, followed in *Hira Naikin* v. *Radha Naikin* (1912), 37 Bom. 116; 14 Bom. L. R. 1129. See *Ghasiti* v. *Nanhi Jan* (1893), 20 I. A. 193, at pp. 201, 202; 21 Calc. 149, at p. 156.

[10] *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 495; 4 Bom. L. R. 116.

[11] See *Mathura Naikin* v. *Esu Naikin* (1880), 4 Bom. 545, at p. 570.

[12] Act XLV. of 1860, ss. 372, 373. See *Queen-Empress* v. *Ramanna* (1889), 12 Mad. 273.

[13] *Sanjivi* v. *Jalajakshi* (1899), 21 Mad. 229; *Kamalakshi* v. *Ramasami Chetti* (1895), 19 Mad. 127; see *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491; 4 Bom. L. R. 116.

In *Venku* v. *Mahalinga*,[1] Muttusami Ayyar, J., said, "We may set aside or decline to enforce a contract or disposition which has for its immediate object the prostitution of a minor during her minority so as to leave her no choice of married life when she is over sixteen years. The policy of the Penal Code, as it seems to me, is not to obliterate altogether the line of distinction between the province of ethics and that of law, but to protect the chastity of minors and to assure to them the freedom of choosing married life when they attain their age, whether they are the natural or adopted daughters of dancing women, and to leave otherwise the incidents of their legal *status* as daughters untouched, whether the parties concerned are dancing women or ordinary Hindus."

Effect was given to an adoption by a prostitute dancing-girl in *Narasanna* v. *Gangu*.[2]

Disputes as to Adoption.

Suits in which question of adoption arises.

A question as to the factum or validity of an adoption would arise in a suit or other proceeding in which the alleged adopted son is asserting his title as such, or in a suit brought against him for the purpose of disputing his title as an adopted son, or in a suit to recover property held by him by virtue of such alleged title, or in a suit for the purpose of preventing him from acting as adopted son.[3]

Who is entitled to dispute adoption.

An alleged adoption may be disputed by any person whose interests are prejudicially affected by it.[4]

Adoption by widow.

A suit to declare the invalidity of an adoption by a widow can only, as a general rule, be brought by the presumptive reversionary heir.[5] Such a suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow or have precluded themselves from interfering,[6]

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[1] (1888), 11 Mad. 393, at p. 402, differed from in *Hira Naikin* v. *Radha Naikin* (1912), 37 Bom. 116, at p. 120; 14 Bom. L. R. 1129, at p. 1133.

[2] (1889), 13 Mad. 133.

[3] In *Kalova* v. *Padapa Valad Bhujangrav* (1876), 1 Bom. 248, it was held that a suit would lie to obtain an injunction restraining a person from performing the *Shraddh* or other ceremonies as an adopted son, or assuming the status of such adopted son.

[4] See Specific Relief Act (I. of 1877), s. 42, *post*, p. 165; *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (1913), 40 I. A. 213, at p. 221; 40 Calc. 966, at p. 980; 17 C. W. N. 1189, at p. 1194; 15 Bom. L. R. 867, at p. 875.

[5] *Thakoorain Sahiba* v. *Mohun Lall* (1867), 11 M. I. A. 386; 7 W. R. P. C. 25. See Specific Relief Act (I. of 1877), s. 42, illus., *post*, p. 166, and cases, *post*, note 6.

[6] *Anund Koer* (*Rani*) v. *Court of Wards* (1880), 8 I. A. 14, at pp. 22, 23; 8 Calc. 764, at pp. 772, 773; 8 C. L. R. 381, at pp. 385, 386; *Ramabai* v. *Rangrav* (1894), 19 Bom. 614; *Bhikaji Apaji* v. *Jagannath Vithal* (1873), 10 Bom. H. C. 351; *Brojo Kishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145, at p. 157; 11 W. R. C. R. 468, at p. 470.

or refuse, without sufficient cause, to take steps,[1] or where the next reversioner has only a limited estate,[2] but not otherwise.[3]

The nearer reversioner would apparently be a necessary party defendant to a suit brought by a more distant reversioner.[4]

Adoption by adoptive father.

In case of an adoption by the husband the widow or other heir may sue, at any rate after the death of the adoptive father. If the parties are governed by the Mitakshara law the coparceners may apparently sue at any time.

In case of the widow, or other limited heir,[5] colluding, or being precluded from interfering, the presumptive reversionary heir may sue, and possibly in case such presumptive reversionary heir is also colluding, a more distant reversioner may sue.

Suit by adopter.

Except in a case where he is estopped from so doing,[6] a suit seeking to declare an alleged adoption to be invalid may be brought by the person making the adoption.[7]

Declaratory decree.

A declaratory decree will not be made as of right. Sec. 42 of the Specific Relief Act[8] is as follows :—

Discretion of Court as to declarations of status or right.

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character of right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief.

Bar to such declaration.

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

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[1] *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53.

[2] Cf. *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62 ; 9 C. W. N. 25.

[3] See *Anyaba* v. *Daji* (1895), 20 Bom. 202 ; *Gyanendro Nath Roy* v. *Lobongomunjori Dabi* (1882), 11 C. L. R. 198.

[4] See *Anund Koer (Rani)* v. *Court of Wards* (1880), 8 I. A. 14, at p. 23 ; 6 Calc. 764, at p. 772 ; 8 C. L. R. 381, at pp. 385, 386 ; *Gurulingaswami* v. *Ramalakshmamma* (1894), 18 Mad. 53, at p. 58 ; *Ramabai* v. *Rangrav* (1894), 19 Bom. 614.

[5] Such as a daughter.

[6] *Post*, p. 172.

[7] As, for instance, where the adoptor has been induced to adopt by misrepresentation or coercion (*ante*, p. 152.

[8] I. of 1877. The right to bring a suit to declare an adoption to be invalid independently of a claim to property has been incidentally recognized by the Legislature, see Court Fees Act (VII. of 1870, s. 2, art. 17, cl. 5) and Limitation Acts (IX. of 1871, Sched. II., art. 129 ; XV. of 1877, Sched. II., art. 118 ; IX. of 1908, Sched. I., art. 118).

Explanation.—A trustee of property is a person interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Illustration.

A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.[1]

Suit to determine right to take in adoption.

It is unsettled whether, in exercise of the discretion given to it by the Specific Relief Act,[2] the Court can determine a right to take in adoption before the adoption has taken place.

The High Court of Bengal has held in an unreported case that a suit will lie for a declaration that a permission set up by a widow is false.[3] The same Court decided in a case under the law before the Specific Relief Act came into force that such suit will not lie,[4] relying on the decision of the Judicial Committee in *Sree Narain Mitter* v. *Kishen Soondory Dassee (Sreemutty)*,[5] but in the last-named case the suit was merely to set aside certain deeds of gift and acceptance in adoption, under which the defendant took no interest. It may in many cases be desirable that the question should be determined in order to save the parties expense, to save the boy from the peril of his adoption being declared invalid, and to save the estate from the expense of maintaining the boy if the adoption be declared invalid.[6] On the other hand, the boy would not be generally bound by the decree, as unless the adoption of a particular boy were contemplated, he could not be made a party to the suit.

It would be difficult to stretch the terms of s. 42 of the Specific Relief Act (I. of 1877) to permit a suit of this kind being successful.

Injunction.

There seems to have been no case in which an injunction has been granted to restrain the performance of an adoption,[7] but provided the application be made in due time, and there be

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[1] For an instance of such declaration before the passing of the Specific Relief Act, see *Kotamarti Sitaramayya* v. *Kotamarti Vandhanamara* (1874), 7 Mad. H. C. 351.

[2] S. 42, above.

[3] *Rajputty Koeri (Mussummat)* v. *Nripabati (Mussummat)*, A. O. D. 4 of 1887, referred to in Sarkar's "Law of Adoption," p. 434.

[4] *Run Bahadoor Singh* v. *Lucho Coowar (Musst.)* (1879), 4 C. L. R. 270). See also *Rajcoomaree Dossee (Sreemutty)* v. *Nobocoomar Mullick* (1856), Boul. 137; *Pearee Doyee (Mussamut)* v. *Hurbunsee Kooer (Mussamut)* (1873), 19 W. R. C. R. 127; *Subudra Chowdrayn (Mussamaut)* v. *Goluknath Chowdhry* (1843), 7 Ben. Sel. R. 143 (new edition, 166).

[5] (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171. S. C. *sub nomine*, *Nogendro Chundro Mitro* v. *Kishen Soondery Dossee (Sreemutty)*, 19 W. R. C. R. 133.

[6] See *post*, pp. 202–204.

[7] See *Assur Purshotam* v. *Ratanbai* (1888), 13 Bom. 56.

no objection on the merits, there seems no reason why a Court should not be justified in issuing such injunction.[1]

There is authority that an *interim* injunction will not be granted to restrain the carrying out of an adoption.[2]

Specific performance of agreement.

The Courts will not decree specific performance of an agreement to give or take in adoption,[3] but the breach of such agreement would apparently give a right to damages.[4]

Res judicata.

A decision as to the *factum* or validity of an adoption will only bind the persons who are parties to such decision and those claiming under them.[5]

Thus a decision in a probate proceeding, upholding a will which prohibited adoption was held to prevent a suit to uphold an adoption, the parties being the same,[6] but where the parties are different, the decision in the probate proceeding does not operate as *res judicata*, although the question of adoption may have been incidentally decided in such proceeding.[7]

It is unsettled whether a decision as to the fact, or the validity of an adoption in a suit between the alleged adopted son and a person who is, during the lifetime of the widow, the then immediate reversioner, will bind another person who may succeed to the reversion.[8] The Madras High Court has held that he is bound,[9] but this is not in accordance with the views of the other High Courts. See *Venkatarayana Pillay* v. *Subbammal* (1915), 42 I. A. 125; 38 Mad. 406; 19 C. W. N. 461; 17 Bom. L. R. 468.

When the question is decided, after the death of the widow, in a suit between the adopted son and the person who would in the absence of the adopter be entitled to the reversion after her death, such decision would bind all persons subsequently interested in the estate as that person represents the reversion.

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1 See Specific Relief Act (I. of 1877), s. 54.

2 See *Assur Purshotam* v. *Ratanbai* (1888), 13 Bom. 56; *Atrani (Bai)* v. *Deep Sing Baria Thakor* (1915), 40 Bom. 86; 17 Bom. L. R. 1097.

3 Specific Relief Act (I. of 1877), s. 21*b*.

4 See *Sree Narain Mitter* v. *Kishen Soondoree Dossee* (1873), I. A. Sup. Vol. 149, at p. 160; 11 B. L. R. 171, at p. 188.

5 See Civil Procedure Code (Act V. of 1908), s. 11.

6 *Brendon* v. *Sundarabai* (1913), 38 Bom. 272; 16 Bom. L. R. 161.

7 *Dulhin Genda* v. *Harnandan Prashad Singh* (1916), P. C. 20 C. W. N. 617.

8 See *Bhagwanta* v. *Sukhi* (1899), 22 All. 33; *Chhiddu Singh* v. *Durga Dei* (1900), 22 All. 382. This question was left undecided in *Brojokishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463, and in *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72, at p. 84; 1 Calc. 289, at p. 296; 25 W. R. C. R. 235, at p. 239. The fact that a previous suit by a reversioner has been unsuccessful may be a reason for refusing a mere declaratory decree (see *ante*, pp. 165, 166) at the suit of another reversioner. The idea that a decision in a question of adoption had the effect of a judgment *in rem* was disposed of in *Kanhya Lall* v. *Radha Churn* (1867), B. L. R. F. B. R. 662; 7 W. R. C. R. 338. The matter is now dealt with by the Evidence Act (I. of 1872), s. 43.

9 *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390.

A decision in a litigation which has been *bonâ fide* instituted and conducted between the alleged adopted son and the widow in whom the property was vested would, in the case where the adoption was alleged to be made by the widow's husband, bind the reversioners. Probably it would also have the same effect where the adoption is said to have been made by the widow,[1] but she denies it.

A decision against one person claiming to be an adopted son would not bind another person claiming under another act of adoption.[2]

Under the Specific Relief Act,[3] a declaration is only binding on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. As these expressions do not include the case of a subsequent reversioner, it seems clear that a declaration, or the refusal to grant one, in a suit by one reversioner does not bind another reversioner.

On the death of a presumptive reversioner during the pendency of a suit or appeal by him to declare an adoption invalid, the right of suit or appeal devolves upon a surviving reversioner.[4]

Limitation of suit to declare adoption invalid.

A suit "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place," must be brought within "six years" from the time "when the alleged adoption becomes known to the plaintiff."[5]

This provision is confined to declaratory suits, and does not, it is submitted, alter the limitation for suits for possession of property.[6]

There is a conflict of authority as to whether the effect of this provision is to bar suits for possession of property against a person holding under an alleged adoption which are brought more than six years after the alleged adoption becomes known to the plaintiff, or whether it is confined

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[1] See *Katama Natchiar* v. *Rajah of Shivagunga* (1864), 9 M. I. A. 543, at p. 608; 2 W. R. P. C. 31, at p. 37. This was the view of the majority of the Court in *Risal Singh* v. *Balwant Singh* (1915), 37 All. 496.

[2] See *Anundmoyee Chowdhoorayan (Mussumauth)* v. *Sheeb Chunder Roy* (1862), 9 M. I. A. 291, at p. 306; 2 W. R. P. C. 19, at p. 21; Marsh, 455, at p. 460.

[3] I. of 1877, s. 43.

[4] *Venkatanarayana Pillay* v. *Subbammal* (1915), 42 I. A. 125; 38 Mad. 406; 19 C. W. N. 641; 17 Bom. L. R. 468.

[5] Act IX. of 1908, Sched. I., art. 118. "'Plaintiff' includes also any person from or through whom a plaintiff derives his right to sue," s. 3. *Ayyadori Pillai* v. *Solai Ammal* (1901), 24 Mad. 405.

[6] *Tirbhuwan Bahadur Singh (Thakur)* v. *Rameshar Baksh Singh (Raja)* (1906), 33 I. A. 156; 28 All. 727; 10 C. W. N. 1065; 8 Bom. L. R. 722; *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (1911), 39 I. A. 19; 16 C. W. N. 458; 14 Bom. L. R. 182; *Velaga Mangamma* v. *Bandlamudi Veerayya* (1907), 30 Mad. 308. See *Chunni Lal* v. *Setaram* (1911), 34 All. 8. Limitation would run from the death of the widow who purports to adopt, see *Bhagwat Pershad* v. *Murari Lall* (1910), 15 C. W. N. 524, *post*, p. 509.

to cases where a declaration only can be obtained, and there is no present right to substantive relief.[1]

The Madras[2] and Bombay[3] High Courts held that it has the former effect, but in Calcutta[4] and Allahabad[5] a contrary view has been expressed.

The Madras decision was based upon two judgments of the Judicial Committee[6] with reference to the construction of Act 129 of the 2nd Schedule of an earlier Limitation Act (IX. of 1871). That article provided a limitation for suits to "set aside an adoption," and was held to be equally applicable to suits seeking a mere declaration that the adoption was invalid, and to suits which sought the possession of property held under colour of an alleged adoption. Although the phraseology of that article differs from that of the article now in force, which in terms contemplates only a declaratory suit,[7] there are observations of the Judicial Committee which were held to be equally applicable to the present law.[8] This rule of limitation had no application to a case where the proceeding or document is on its face no obstacle to the title of the heir, as, for instance, where a woman adopts to herself and not to her husband.[9]

The Madras High Court[10] now takes a different view having regard to the decision of the Judicial Committee in the case of *Tirbhuwan Bahadur*

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[1] As where the widow is alive, and the reversioner seeks to have it declared that the adoption made by her is not valid. See Specific Relief Act (I. of 1877), s. 42, *ante*, pp. 165, 166. This question was raised, but not determined, in *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 51; 22 Calc. 609.

[2] *Parvathi Ammal* v. *Saminatha Gurukal* (1896), 20 Mad. 40. Cf. *Ratnamasari* v. *Akilandammal* (1902), 26 Mad. 291.

[3] *Shrinivas Sarjerav* v. *Balwant Venkatesh* (1913), 37 Bom. 513; 15 Bom. L. R. 533; *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (1899), 24 Bom. 260, overruling *Harilal Pranlal* v. *Bai Rewa* (1895), 21 Bom. 376; *Fannyamma* v. *Manjaya Hebbar* (1895), 21 Bom. 159, and *Padajirav* v. *Ramrav* (1888), 13 Bom. 160, which last case was decided under Art. 119 of the Schedule (*post*, p. 170); *Ramchandra Vinayak Kulkarni* v. *Narayan Babaji* (1903), 27 Bom. 614; *Barot Naran* v. *Barot Jesang* (1900), 25 Bom. 26.

[4] *Ram Chandra Mukerjee* v. *Ranjit Singh* (1899), 27 Calc. 242, at pp. 253–255; 4 C. W. N. 405, at pp. 411–413; *Parbhu Lal* (*Lala*) v. *Mylne* (1887), 14 Calc. 401; *Baikanta Chandra Roy Chowdhury* v. *Kali Charan Roy Chowdhury* (1904), 9 C. W. N. 222. Cf. *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354.

[5] *Lali* v. *Murlidhar* (1901), 24 All. 195; *Nalthu Singh* v. *Gulab Singh* (1895), 17 All. 167; *Basdeo* v. *Gopal* (1886), 8 All. 644; *Ganga Sahai* v. *Lekhraj Singh* (1886), 9 All. 253, at pp. 267–269. *Contrà Inda* v. *Jehangira*, All. Weekly Notes, 1890, p. 241.

[6] *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1886), 13 I. A. 84; 13 Calc. 308; *Mohesh Narain Moonshee* v. *Taruck Nath Moitra* (1892), 20 I. A. 30; 20 Calc. 487.

[7] Cf. Art. 119, which also speaks of a suit for a declaration, but apparently contemplates substantive relief on the ground of the plaintiff's rights being interfered with.

[8] *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1886), 13 I. A. 84, at p. 95; 13 Calc. 308, at pp. 320, 321.

[9] *Raj Bahadoor Singh* v. *Achumbit Lal* (1879), 6 I. A. 110; 6 C. L. R. 12; *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), 22 I. A. 15; 22 Calc. 609.

[10] *Velaga Mangamma* v. *Bandlamudi Veerayya* (1907), 30 Mad. 108.

Singh (Thakur) v. *Rameshar Baksh Singh (Raja)*,[1] but the Bombay High Court maintains its original view.[2]

If the right of the nearest reversioner for the time being to contest an adoption by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners.[3]

Adverse possession.

The right to bring such suit would be barred where the person claiming under an alleged adoption has held the property for more than twelve years adversely to the widow of his adoptive father[4] or to the plaintiff.

Limitation of suit to declare adoption valid.

A suit "to obtain a declaration that an adoption is valid" must be brought within "six years" from the time "when the rights of the adopted son, as such,[5] are interfered with."[6]

It has been held by the High Courts of Bengal[7] and the North-West Provinces[8] that this article does not prevent a suit for possession by a person claiming as an adopted son, even though it be brought more than six years after his rights have been interfered with. This view is, it is submitted, correct.[9] A different view has been accepted in Bombay.[10] In Madras the High Court has differed on this question.[11] The section clearly does not bar a suit in which the plaintiff claims to succeed independently of the alleged adoption.[12]

Adverse possession.

Where time has begun to run before the adoption as in the case of the widow being dispossessed, the adopted son may be barred by adverse possession,[13] but in a suit claiming property alienated by the widow before the adoption, time does not begin to run before the adoption.[14]

Election.

Where a person, entitled to dispute an adoption, is benefited in the same character by a will, or other disposition of

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[1] (1906), 33 I. A. 156; 28 All. 727; 10 C. W. N. 1065; 8 Bom. L. R. 722.

[2] *Shrinivas Sarjerav* v. *Balwant Venkatesh* (1913), 37 Bom. 513; 15 Bom. L. R. 583.

[3] *Bhagwanta* v. *Sukhi* (1899), 22 All. 33. Cf. *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25. See *ante*, p. 168.

[4] Act IX. of 1908, Sched. I., art. 144; *Ghandarap Singh* v. *Lachman Singh* (1888), 10 All. 485.

[5] See *Gangabai* v. *Tarabai* (1902), 26 Bom. 720.

[6] Act IX. of 1908, Sched. I., art. 119.

[7] *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354.

[8] *Lali* v. *Murlidhar* (1901), 24 All. 195; (S. C. on appeal (1901) 33 I. A. 97; 28 All. 488; 10 C. W. N. 130; 8 Bom. L. R. 402); *Chandania* v. *Saligram* (1903), 26 All. 40.

[9] See *ante*, pp. 168, 169.

[10] See *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (1899), 24 Bom. 260, differing from *Padajirav* v. *Ramrav* (1888), 13 Bom. 160; *Laxmana* v. *Ramappa* (1907), 32 Bom. 7; 9 Bom. L. R. 1054; *Shrinivas Sarjerav* v. *Balwant Venkatesh* (1915), 37 Bom. 513; 15 Bom. L. R. 583.

[11] *Ratnamasari* v. *Akilandammal* (1902), 26 Mad. 291.

[12] See *Gangabai* v. *Tarabai* (1902), 26 Bom. 720.

[13] *Gobind Chandra Sarma Mazoomdar* v. *Anand Mohan Sarma Mazoomdar* (1869), 2 B. L. R. A. C. 313.

[14] *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809.

property, which benefits the person adopted, he must elect whether to take under the will, or other disposition, or against it.

"A principle not peculiar to English law, but common to all law, which is based on the rules of justice, namely . . . that a party shall not, at the same time, affirm and disaffirm the same transaction—affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice." [1]

Burden of proof.

A person, whose title depends upon an adoption, must, in a contest between him and the person who would succeed in the absence of such adoption, prove the fact of the adoption,[2] the performance of the ceremonies [3] (if any) which may be necessary,[4] and such facts as are necessary to establish its validity.[5] If the adoption was by a widow, who could not adopt without permission, he must prove the fact of such permission having been given.[6]

The burden of proving the adoption is on the person alleging

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[1] *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. (P. C.), 57, at p. 62. See Act X. of 1865, ss. 167–177, applied to certain Hindu wills by Act XXI. of 1870, s. 2.

[2] See Indian Evidence Act (I. of 1872), ss. 101–103; *Sootroogun Sutputty* v. *Sabitra Dye* (1834), 2 Knapp, 287; 5 W. R. P. C. 109; *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at pp. 356, 357; 2 B. L. R. (P. C.), 101, at p. 104; 12 W. R. P. C. 1, at pp. 2, 3; *Kishori Lal* v. *Chunni Lal* (1908), 36 I. A. 9; 31 All. 116; 13 C. W. N. 370; 11 Bom. L. R. 196; *Lal Kunwar* (*Musammat*) v. *Chiranji Lal* (1909), 37 I. A. 1; 14 C. W. N. 285; 12 Bom. L. R. 244; *Ramprotab Misser* v. *Abhilak Misser* (1878), 3 C. L. R. 170, at p. 174; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. (A. C.) 145, at pp. 158, 159, 11 W. R. C. R. 468, at p. 474; *Bissessur Chuckerbutty* v. *Ram Joy Mojoomdar* (1865), 2 W. R. C. R. 326, at p. 328; *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145, at p. 147; *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note.

[3] *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A.

[4] See *ante*, pp. 149, 153–155.

[5] *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A. In *Rango Balaji* v. *Mudieyppa* (1898), 23 Bom. 296, at p. 303, it was held that the person setting up an adoption was required to establish the death of the natural son of his adoptive father at the time of the adoption.

[6] *Chowdry Pudum Singh* v. *Koer Oodey Singh* (1869), 12 M. I. A. 350, at p. 356; 2 B. L. R. (P. C.) 101, at p. 104; 12 W. R. (P. C.), 1, at pp. 2, 3; *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 125; 29 All. 519; 11 C. W. N. 841; *Kishori Lal* v. *Chunni Lal* (1908), 36 I. A. 9; 31 All. 116; 13 C. W. N. 370; 11 Bom. L. R. 196; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. (A. C.) 145, at pp. 158, 159; 11 W. R. C. R. 468, at p. 474; *Kripa Moyee Debia* v. *Goluck Chunder Roy* (1865), 4 W. R. C. R. 78; *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145, at p. 147; *Oomrao Singh* (*Thakoor*) v. *Mehtab Koonwer* (*Thakooranee*) (1868), 3 Agra, 103A.

it, in the unusual case of the adoption being denied by the person alleged to be adopted.[1]

Where the plaintiff claims property as heir, and is unable to establish his relationship, it is unnecessary for the defendant to prove his adoption.[2]

In certain summary proceedings a *de facto* adoption might be acted upon until set aside in a properly constituted suit.[3]

Where the fact of the adoption was admitted, and it was alleged that the natural father had lost his right to give in adoption, it was held the burden of proving such loss is upon the persons alleging it.[4]

There is authority that in a suit which merely seeks to declare an alleged adoption to be invalid the burden of proof is upon the person seeking to obtain such declaration,[5] but there is also authority to the contrary.[6] It is submitted that the latter view is correct.

Estoppel.

A person, who is otherwise entitled to dispute an adoption, may be estopped from disputing it, although the same adoption may be liable to be disputed by other persons who are not so estopped. Estoppel operates merely as a personal disqualification, and does not otherwise affect the validity of the adoption.[7]

Evidence Act, s. 115.

The Indian Evidence Act,[8] s. 115, enacted as follows :—

"Where one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief,[9] neither he nor his representative[10] shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

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[1] *Chandra Kunwar (Rani)* v. *Narpat Singh (Chaudhri)* (1906), 34 I. A. 27; 29 All. 184; 11 C. W. N. 321; *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 125; 29 All. 519; 11 C. W. N. 841.

[2] *Kalikishore Dutt Gupta Mozoomdar* v. *Bhusan Chunder* (1890), 18 Calc. 201.

[3] See *Nunkoo Singh* v. *Purm Dhun Singh* (1869), 12 W. R. C. R. 356, which was a case under the Certificate Act (XXVII. of 1860). See *Ramprotab Misser* v. *Abhilak Misser* (1878), 3 C. L. R. 170, at p. 173.

[4] *Kusum Kumari Roy* v. *Satya Ranjan Das* (1903), 30 Calc. 999; 7 C. W. N. 784.

[5] *Asharfi Kunwar* v. *Rup Chand* (1908), 30 All. 197; *Brojo Kishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463, at p. 467; *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (1873), 21 W. R. C. R. 84. See *ante*, pp. 165, 166.

[6] *Rajagopala Reddy* v. *Nattu Govinda Reddy* (1910), 34 Mad. 329.

[7] See *Parvatibayamma* v. *Ramakrishna Rau* (1894), 18 Mad. 145, at p. 146.

[8] Act I. of 1872.

[9] *Yashvant Puttu Shenvi* v. *Radhabai* (1889), 14 Bom. 312.

[10] This would not include an auction purchaser at a sale of property belonging to the person estopped: *Parbhu Lal (Lala)* v. *Mylne* (1887), 14 Calc. 401.

For instance, a widow representing to the natural father that she had a power to adopt, and thereby inducing him to give his son in adoption, would be estopped from thereafter denying the power.[1]

Allowing the thread ceremony and marriage to be performed in the adoptive family, and otherwise allowing the youth to act as an adopted son, would amount to an estoppel.[2]

Active participation in the adoption may also operate as an estoppel.[3]

A person may be so estopped, although he was acting in good faith, or without a full knowledge of the circumstances, or was under a mistake or misapprehension.[4] Good faith.

The person taking in adoption would generally, in the absence of fraud or coercion, be estopped from denying the adoption,[5] but where there has been no mis-statement,[6] or conduct equivalent thereto, or where the mis-statement has not been acted upon,[7] there can be no estoppel.

A person is not estopped from denying an adoption merely because he had previously secured succession to properties by setting up that adoption, when it appears that his claim as adopted son was not opposed by the person as against whom he is said to be estopped.[8]

The acts of a Hindu female, who "is acting without the guidance of a disinterested adviser, cannot prejudice her." [9]

The misrepresentation to operate as an estoppel must apparently be of a matter of fact. An erroneous expression of opinion that an adoption was valid in law could not apparently lead to an estoppel, nor could a person be estopped from asserting the state of the law.[10] Matters of law.

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[1] *Kannammal* v. *Virasami* (1892), 15 Mad. 486; *Dharam Kunwar* (*Rani*) v. *Balwant Singh* (1912), 39 I. A. 142; 34 All. 398; 16 C. W. N. 675; 14 Bom. L. R. 485.

[2] *Santappayya* v. *Rangappayya* (1894), 18 Mad. 397; *Dharam Kunwar* (*Rani*) v. *Balwant Singh* (1912), 39 I. A. 142; 34 All. 398; 16 C. W. N. 675; 14 Bom. L. R. 485; S. C. in Court below (1908), 30 All. 549.

[3] *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (1874), 11 Bom. H. C. 190; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473, at p. 481; 2 Bom. L. R. 163; *Chintu* v. *Dhondu*, 11 Bom. H. C. 192, note.

[4] *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892), 19 I. A. 203, at p. 215; 20 Calc. 296, at p. 310, overruling *Ganga Sahai* v. *Hira Singh* (1880), 2 All. 809, and *Vishnu Nambudri* (*Eranjoli Illath*) v. *Krishnan Nambudri* (*Eranjoli Illath*) (1883), 7 Mad. 3.

[5] See *Dharam Kunwar* (*Rani*) v. *Balwant Singh* (1912), 39 I. A. 142; 34 All. 398; 16 C. W. N. 675; 14 Bom. L. R. 485; *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 396; *Sukhbasi Lal* v. *Guman Singh* (1879), 2 All. 366; *Chintu* v. *Dhondu* (1873), 11 Bom. H. C. p. 192, note; *Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199.

[6] See *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108, at p. 128; 19 Calc. 513, at p. 532; *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429, at pp. 433, 434.

[7] See *Kuverji* v. *Babai* (1890), 19 Bom. 374; *Parvatibayamma* v. *Ramakrishna Rau* (1894), 18 Mad. 145, at p. 149.

[8] *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 125; 29 All. 519; 11 C. W. N. 841.

[9] *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429, at p. 433. See *ante*, p. 152, note 10.

[10] See *Gopee Lall* v. *Chundraolee Buhoojee* (*Mussamat Sree*) (1872), I. A. Sup. Vol. 131, at p. 133; 11 B. L. R. 391, at p. 395; 19 W. R. C. R. 12, at p. 13; *Kuverji* v. *Babai* (1890), 19 Bom. 374, at pp. 390, 391. See *Rajnarain Bose* v. *Universal Life Assurance Company* (1881), 7 Calc. 594.

In *Parvatibayamma* v. *Ramakrishna Rau*,[1] it was laid down on the authority of *Gopalayyan* v. *Raghupatiayyan*,[2] that "the claimant has to show that by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been altered so that it would be impossible to restore him to it." This limitation to the doctrine of estoppel is not, it is submitted, justified by the terms of sec. 115 of the Evidence Act. There seems to have been no estoppel in that case, as the representation, if made, was neither believed nor acted upon.

Acquiescence. Mere acquiescence, even presence at the adoption, does not create an estoppel,[3] and cannot alter rights unless the acquiescence extends to the period provided by the law of limitation.[4]

Mode of proof. The fact of the adoption, and of the power (if any), and of the circumstances necessary to establish the validity of the adoption, must be proved in the same way as any other fact. There are no special rules of evidence applicable.

The Court must carefully and strictly examine the evidence as to the completion of the act of adoption, and as to the facts which are necessary to validate it.[5]

Acquiescence by the person entitled to dispute an adoption, or by other members of the family, is some evidence of the fact of the adoption. Its value as such must depend upon the circumstances. Where it has arisen from an imperfect knowledge of the facts it can be of no value.[6]

A statement as to the existence of the power by the person alleged to have given it is evidence in support of it.[7]

As to statements by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, when these statements relate to the existence of relationship by adoption, see the Indian Evidence Act I. of 1872, sec. 32 (5), (6).

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[1] (1894), 18 Mad. 145, at p. 148 (see also pp. 151, 152).

[2] (1873), 7 Mad. H. C. 250.

[3] *Gurulingaswami* v. *Ramalakshmamma* (1894); 18 Mad. 53, at p. 60; *Papamma* v. *Appa Rau* (1893), 16 Mad. 384, at p. 391; *Vaithilingam Mudali* v. *Murugaian* (1912), 37 Mad. 529.

[4] See *Uda Begam* v. *Imam-ud-din* (1875), 1 All. 82; *Taruck Chunder Bhuttacharjee* v. *Hurro Sunkur Sandyal* (1874), 22 W. R. C. R. 267; *Rajan* v. *Basuva Chetti* (1865), 2 Mad. H. C. 428; *Ram Rau* v. *Raja Rau* (1864), 2 Mad. H. C. 114; *Pedda-muthulaty* v. *N. Timma Reddy* (1864), 2 Mad. H. C. 270.

[5] *Imrit Konwur* v. *Roop Narain Singh* (1880), 6 C. L. R. 76, at p. 823; *Kenchawa* v. *Ningupa* (1867), 10 Bom. H. C. 265, note. See *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145; *Sootroogun Sutputhy* v. *Sabitra Dye* (1835), 2 Knapp, 287; 5 W. R. P. C. 109; *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at p. 425; 7 W. R. P. C. 71; *Diwakar* v. *Chandanlal* (1916), 44 Calc. 201; 21 C. W. N. 314; 18 Bom. L. R. 992.

[6] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 62. See Act I. of 1872, s. 50.

[7] Indian Evidence Act (I. of 1872), ss. 21, 32 (5), *Kishen Sunker Dutt* v. *Moha Mya Dossee*, W. R. 1864, C. R. 210.

A statement amounting to an admission by the person alleged to have been adopted will be evidence against him requiring explanation.[1]

An ancient report of a *panchayet* as to the pedigree of a family has been held to establish an adoption which was not then disputed.[2]

A tradition in a *wajib-ul-arz* has been acted upon by the Judicial Committee.[3]

"It may be desirable carefully to examine cases of possible fraud, yet . . . instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as nothing, on a mere suspicion of perjury and forgery."[4]

After such a lapse of time as makes it impossible, or difficult, to obtain direct evidence of the adoption, or of the performance of the necessary ceremonies, or of the giving of the necessary permission, evidence of recognition by the adoptive parents, or by other members of the family, or of treatment as an adopted son by permitting him to perform the family worship, or to share in the inheritance, or otherwise, may be sufficient to establish an adoption, or, at any rate, to render slight evidence sufficient,[5] and in any case will, it is submitted, be admissible in support of the adoption,[6]

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[1] See *Chandra Kunwar (Rani)* v. *Narpat Singh (Chaudhri)* (1906), 34 I. A. 27; 29 All. 184; 11 C. W. N. 320; 9 Bom. L. R. 267.

[2] *Ajabsing* v. *Nanabhau Valad Dhansing Raul* (1898), 26 I. A. 48; 3 C. W. N. 130.

[3] *Achal Ram (Lal)* v. *Kazim Husain Khan (Raja)* (1905), 32 I. A. 113; 27 All. 271; 9 C. W. N. 477.

[4] *Kalichandra Chowdhry* v. *Shibchandra Bhaduri* (1870), 6 B. L. R. 501, at p. 508; 15 W. R. P. C. 12, at p. 14. See *Chundernath Roy (Rajah)* v. *Gobindnath Roy (Kooar)* (1872), 11 B. L. R. 86, at p. 98; 18 W. R. 221, at pp. 222, 223.

[5] See *Rup Narain* v. *Gopal Devi (Mussamat)* (1909), 36 I. A. 103; 36 Calc. 780; 13 C. W. N. 920; 11 Bom. L. R. 833; *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (1871), 14 M. I. A. 67, at pp. 76, 77; 7 B. L. R. 216, at pp. 227, 228; 15 W. R. P. C. 41, at pp. 44, 45; *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 105; 7 W. R. P. C. 57, at p. 62; *Vyas Chimanlal* v. *Vyas Ramchandra* (1899), 24 Bom. 473; 2 Bom. L. R. 163; *Ramalinga Pillai* v. *Sadasiva Pillai* (1864), 9 M. I. A. 510, at p. 519; 1 W. R. P. C. 25, at p. 26; *Anandrav Sivaji* v. *Ganesh Eshvant Bokil* (1863), 7 Bom. H. C. App. xxxiii. (distinguished in *Vaithilingam Mudali* v. *Murugaian* (1912), 37 Mad. 529); *Sabo Bewa* v. *Nahagun Maiti* (1869), 2 B. L. R. App. 51; 11 W. R. C. R. 380; *Nittianand Ghose* v. *Krishna Dyal Ghose* (1871), 7 B. L. R. 1; 15 W. R. C. R. 300; *Perkash Chunder Roy* v. *Dhunmonnee Dassea*, Ben. S. D. of 1853, p. 96; *Hur Dyal Nag* v. *Roy Krishto Bhoomick* (1875), 24 W. R. C. R. 107; *Herasutollah (Chowdhry)* v. *Brojo Soondur Roy* (1872), 18 W. R. C. R. 77, at p. 80; *Tincourie Chatterjee* v. *Denonath Banerjee*, W. R. 1864, C. R. 155; *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145; *Mohendro Lall Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at p. 46.

[6] See Indian Evidence Act (I. of 1872), s. 50. In that section "it will be noted that the words 'by blood marriage and adoption' have not been inserted after the word 'relationship' by Act XVIII. of 1872, as in the case of s. 32, cls. (5) and (6). Illustration (*a*) refers to the case of marriage, but relationship is not mentioned," Ameer Ali and Woodroffe's "Law of Evidence," 1st ed., p. 360. This would seem to show that the conduct of relations would not be admissible as evidence in the case of adoption, but the Indian Courts have undoubtedly been in the habit of admitting such

but such evidence cannot establish an adoption which is in law invalid.[1]

A person who asks the Court to presume that an adoption did take place, must establish an initial probability that the adoption was likely to have been validly made and that the conduct of the parties cognizant of the facts had been at least consistent with such an hypothesis.[2]

Probabilities.

Where there is conflicting evidence upon the fact of an adoption, much must depend upon the probabilities of the case to be collected from the admitted or proved facts, but such probabilities do not take the place of evidence.

Aged adopter.

Solicitude as to future state.

The fact that the person alleged to have adopted was childless, and advanced in years, and had despaired of having male issue; [3] or the fact that he was anxious to deliver himself from *Put*,[4] gives rise to a probability that he wished to adopt.

Enmity with heir.

The fact that the alleged adoptive father or mother was at enmity with the reversioner might also render an adoption probable.[5]

Religious duty.

The religious duty to adopt a son, which is said to be incumbent upon every childless Hindu,[6] is also a circumstance to be taken into consideration,[7] but by itself it has not much force, having regard "to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death." [8]

Absence of notices and ceremonials.

On the other hand, the absence of notices to relations and of ceremonials may be evidence against the probability of the fact of adoption. In

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evidence. With two exceptions (*Hur Dyal Nag* v. *Roy Krishto Bhoomick* and *Vyas Chimanlal* v. *Vyas Ramchandra*), the decisions on p. 175, note 5, were given before the passing of the Indian Evidence Act.

[1] See, however, *Bhagwat Pershad* v. *Murari Lall* (1910), 15 C. W. N. 524, in which case the Court applied the rule of *id factum valet quod fieri non debuit*, while ignoring the construction of that rule in *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)* (1899), 26 I. A. 113, at p. 144; 22 Mad. 398, at p. 423; 21 All. 460, at p. 487; 3 C. W. N. 427, at p. 448; 1 Bom. L. R. 226 (*ante*, p. 156).

[2] *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (1907), 34 I. A. 125; 29 All. 519; 11 C. W. N. 841.

[3] *Huradhun Mookurjia* v. *Mathoranath Mookurjia* (1849), 4 M. I. A. 414, at p. 425; 7 W. R. P. C. 71; *Puttu Lal* v. *Parbati Kunwar (Musammat)* (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841; 17 Bom. L. R. 549. See *Roopmonjooree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 144, at p. 150; *Bistooprea Patmohadea (Ranee)* v. *Basoodeb Dull Bewurtee Putnaik* (1865), 2 W. R. C. R. 232, at p. 235.

[4] *Huradhun Mookurjia* v. *Muthoranath Mookurjia* (1849), 4 M. I. A. 414, at pp. 425, 426; 7 W. R. P. C. 71.

[5] *Soondur Koomaree Debbeea* v. *Gudadhur Pershad Tewarree* (1858), 7 M. I. A. 54, at pp. 64, 67; 4 W. R. P. C. 116, at pp. 119, 120; *Raghunada (Sri)* v. *Brozo Kishoro (Sri)* (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295.

[6] *Ante*, pp. 101, 102.

[7] See *Raghunada (Sri)* v. *Brozo Kishoro (Sri)* (1876), 3 I. A. 154, at p. 177; 25 W. R. C. R. 291, at p. 295; *Roopmonjoree Chowdranee* v. *Ramlall Sircar* (1864), 1 W. R. C. R. 145, at pp. 150, 151; *Sarodasoondery Dossee (S. M.)* v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 249.

[8] *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at p. 100; 3 B. L. R. (P. C.) 27, at p. 32; 12 W. R. P. C. 29, at p. 31. See *Gurulingaswami (Sri Balusu)* v. *Ramalakshmamma (Sri Balusu)*; *Radhamohun* v. *Hardai Bibi* (1899), 26 I. A. 113, at p. 135; 23 Mad. 398, at p. 414; 21 All. 460, at p. 477; 3 C. W. N. 427, at p. 442; 1 Bom. L. R. 226.

Sootroogun Sutputty v. *Sabitra Dye*,[1] the Judicial Committee say, "But although neither written acknowledgments, nor the performance of any religious ceremonials, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption by which that transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth." [2]

Youth.

The youth,[3] or vigour,[4] of the alleged adopting father, and the consequent probability of male issue, may also be a circumstance rendering the adoption improbable.

Position of parties, and motives.

"In considering the validity of" powers to adopt, "it is of great importance, in the first place, to ascertain the position of the parties at the time when the instruments are alleged to have come into existence, and the motives which may have led to the execution of them." [5]

Presumption as to permission.

A permission to give in adoption may be presumed,[6] but no such presumption may be made with reference to a permission to take in adoption.[7]

Proof of performance of ceremonies.

It has been held [8] that "when the Court is satisfied that the authority to adopt really was given, it will require comparatively slight proof of the performance of the ceremonies by which the adoption is completed. But the Court will not presume that permission was given merely because it is shown that the usual ceremonies were duly performed."

There may be a presumption that a widow does not adopt while in a condition of ceremonial impurity.[9]

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[1] (1835), 2 Knapp, 287, at p. 290; 5 W. R. P. C. 109. See also *Ondy Kadarun* v. *Aroonachella*, Mad. dec. 1857, p. 93; *Bistooprea Patmohadea (Ranee)* v. *Basoodeb Dull Bewartee Patnaik* (1865), 2 W. R. C. R. 232.

[2] Cited with approval in *Diwakar* v. *Chandanlal* (1916), 44 Calc. 201; 21 C. W. N. 314; 18 Bom. L. R. 992.

[3] *Sootroogun Sutputty* v. *Sabitra Dye* (1835), 2 Knapp, 287; 5 W. R. P. C. 109.

[4] In *Sarodasoondery Dossee (S. M.)* v. *Tincowry Nundy* (1863), 1 Hyde, 223, at p. 250, the Court said, "We agree . . . that a Hindu does not adopt in his lifetime, unless he is prepared to acknowledge that he has lost the power of procreation; for, if his wife is sterile, he may marry another wife, and is enjoined to do so after the lapse of a certain time."

[5] *Soondur Koomaree Debbeea* v. *Gudadhur Pershad Tewarree* (1858), 7 M. I. A. 54, at p. 64; 4 W. R. P. C. 116, at p. 119.

[6] "Dattaka Chandrika," s. 1, para. 32.

[7] *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi* (1869), 3 B. L. R. A. C. 145; 11 W. R. C. R. 468.

[8] *Radhamadhub Gossain* v. *Radhabullub Gossain* (1862), 1 Hay, 311; 2 Ind. Jur. O. S. 5. See also *Mohendro Lall Mookerjee* v. *Rookiney Dabee* (1864), Coryton, 42, at pp. 45, 46, where a similar observation was made, "When many years have passed and the person whose adoption is questioned has always been recognized as a son."

[9] See *Ranganayakamma* v. *Alwar Setti* (1889), 13 Mad. 214, at p. 222.

CHAPTER IV.

PARENT AND CHILD (*continued*).

RESULTS OF DATTAKA ADOPTION.

Adoption operates as affiliation.

ADOPTION in the *Dattaka* form completely transfers the boy from the family of his natural father to that of his adoptive father, and, except as specially provided by the law,[1] he acquires, as from the date of the adoption,[2] all the rights, privileges, duties, and obligations of a son born to his adoptive father.[3]

The expressions "father" and "son" in Acts of the Legislatures include in the case of Hindus adoptive fathers and adopted sons.[4]

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[1] These special provisions are to be found in the "Dattaka Mimansa" and the "Dattaka Chandrika," and relate to the effect of the birth of a legitimate son after the adoption (see *post*, pp. 187, 188), and to the restrictions placed upon an adopted son with regard to marriage and adoption in his natural family (see *ante*, pp. 44, 45, and *post*, p. 201).

[2] *Harek Chand Babu* v. *Bejoy Chand Mahatab* (1905), 9 C. W. N. 795, at p. 798; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 814; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637; *Sudanund Mohapattur* v. *Soorjo Monee Debee* (1867), 8 W. R. C. R. 455; S. C. (1869), 11 W. R. C. R. 436 (on appeal in this case this question did not arise, *Soorjomonee Dayee* v. *Suddanund Mohapatter*, I. A. Sup. Vol. 212; 12 B. L. R. 304; 20 W. R. C. R. 377; 9 Mad. Jur. 466); *Narain Mal* v. *Kooer Narain Mytee* (1879), 5 Calc. 251.

[3] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229, at p. 246; 8 Calc. 302, at p. 311; S. C. in Court below, *Puddo Kumaree Debee* v. *Juggutkishore Acharjee* (1879), 5 Calc. 615; *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (1915), 43 I. A. 56; 40 Bom. 270; 20 C. W. N. 702; 18 Bom. L. R. 172; *Joykishore Choudhry* v. *Panchoo Baboo* (1879), 4 C. L. R. 538; *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138, at p. 149; 10 Calc. 232, at p. 237; 13 C. L. R. 379, at p. 381; S. C. in Court below, 6 Calc. 256, and 7 C. L. R. 145; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637; *Teencowree Chatterjee* v. *Denonath Banerjee* (1865), 3 W. R. C. R. 49; *Juggurnath Sahaie (Maharajah)* v. *Mukhun Koonwur (Musst.)* (1865), 3 W. R. C. R. 24.

[4] See the several General Clauses Acts: X. of 1897, s. 3 (18), (53); I. (B. C.) of 1899, s. 3 (42); I. (Bo. C.) of 1904, s. 3 (18), (45); I. (E. B. and A.) of 1909, s. 5 (24), (58); I. (Burm. C.) of 1898, s. 2 (22), (59); I. (Mad. C.) of 1891, s. 3 (30); I. (Punj. C.) of 1898, s. 2 (18), (54); I. (U. P.) of 1904, s. 4 (5), (42). Also see Hindu Wills Act (XXI. of 1870), s. 6; Agra Tenancy Act, II. (U. P.) of 1901, s. 22; *Lala* v. *Nahar Singh* (1912), 34 All. 658; *Thamman Singh* v. *Dal Singh* (1914), 37 All. 7.

The expression "son" in a will includes an adopted son.[1]

When a married man having a son, is taken in adoption, the son does not acquire the *gotra* and a right of succession to the property of the family into which his father is adopted.[2]

When an adoption has been made by a widow, the rights of the adopted son do not date back to the death of his adoptive father.[3]

An adoption *pendente lite* has the same effect as a birth *pendente lite*.[4]

As to an adopted son's impurity on deaths and births, and as to his competency to perform *Sraddha* rites,[5] see Sarkar's "Law of Adoption," p. 388.

Right of guardianship.

The right of guardianship of an adopted son passes by the adoption from the natural parents to the adoptive parents.[6]

Rights of survivorship.

A son adopted by a Hindu governed by the Mitakshara school of law acquires the same rights in coparcenary property on adoption[7] as would be possessed on birth by a natural son born to his adoptive father.[8]

Inheritance *ex parte paternâ*.

Except where a son is born to his adoptive father subsequent to the adoption,[9] an adopted son inherits to his adoptive father,[10]

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[1] *Yethirajulu Naidu* v. *Mukuntha Naidu* (1905), 28 Mad. 363.

[2] *Kalgavda Tavanappa* v. *Somappa Tamangavda* (1909), 33 Bom. 669; 11 Bom. L. R. 797.

[3] *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160. See *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 184; *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10, at p. 16; *Narain Mal* v. *Kooer Narain Mytee* (1879), 5 Calc. 251; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 814; cases collected in Morley's "Digest," vol. iii. 186.

[4] *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637.

[5] See "Dattaka Mimansa," s. 6, para. 50; "Dattaka Chandrika," s. 1, para. 25; s. 3, para. 17.

[6] *Sree Narain Mitter* v. *Kishensoondory Dassee* (*Sreemutty*) (1873), I. A. Sup. Vol. 149, at p. 163; 11 B. L. R. 171, at p. 191; S. C. *sub nomine Nogendro Chundro Mittro* v. *Kishensoondery Dossee* (*Sreemutty*), 19 W. R. C. R. 133, at p. 139; *Lakshmibai* v. *Shridhar Vasudev Takle* (1878), 3 Bom. 1. As to rights of guardianship, see *ante*, pp. 46–49, and *post*, pp. 213, 214.

[7] See *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 67; *Sudanund Mohapattur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205; *Sudanund Mohapattur* v. *Soorjo Monee Debee* (1867), 8 W. R. C. R. 455; S. C. after remand (1869), 11 W. R. C. R. 436. On appeal this question did not arise, *Soorjomonee Dayee* v. *Suddanund Mohapatter* (1873), I. A. Sup. Vol. 212; 12 B. L. R. 304; 20 W. R. C. R. 377; 8 Mad. Jur. 466.

[8] See *post*, pp. 225, 226; *Heera Singh* v. *Buryar Singh* (1866), 1 Agra, 256; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 637.

[9] See *post*, pp. 187, 188.

[10] *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191.

and to the relations, whether lineal or collateral, of his adoptive father to the same extent as he would have inherited if he had been born as a son to his adoptive father.[1]

As to the devesting of estates on adoption, see *post*, pp. 193–199.

The right of the adopted son and of his heirs to inherit to the following relations by adoption has been established:—

1. Paternal grandfather.[2]
2. Paternal uncle.[3]
3. First cousin of his father.[4]
4. First cousin of his grandfather.[5]
5. Father's brother's son.[6]
6. Father's daughter's son.[7]
7. Father's third cousin.[8]
8. The adopted son of the son of the brother of the man to whom the father of the claimant was adopted.[9]

Rights on attaining possession.

Where an adopted son ousts his adoptive father's widow, who has taken possession in ignorance of the adoption, he is entitled to receive such rents and profits which have been received, or might with due diligence have been received, between the death of his adoptive father and his getting possession, credit being given for the maintenance of the widow, funeral expenses, and all such expenditure as she might properly have made as widow, subject to any question as to limitation.[10]

Conversely the relations of the adoptive father will inherit

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[1] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302; S. C. in Court below, *Puddo Kumaree Debee* v. *Juggutkishore Acharjee* (1879), 5 Calc. 615; *Joykishore Chowdhry* v. *Panchoo Baboo* (1879), 4 C. L. R. 538; *Sumbhoochunder Chowdry* v. *Naraini Debia* (1835), 2 Knapp, 55; 5 W. R. P. C. 100; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319; *Mokundo Lal Roy* v. *Bykunt Nath Roy* (1880), 6 Calc. 289; 7 C. L. R. 478; *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (1881), 9 C. L. R. 379; 8 C. L. R. 57; *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (1868), 9 W. R. C. R. 423; *Rajé Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191; *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 250); *Gooroopershad Bose* v. *Rashbehary Bose*, Ben. S. D. A. 1860, p. 411.

[2] *Gourbullub* v. *Juggernath Persaud Mitter* (1824), Sir F. Macnaghten's "Considerations," p. 5.

[3] In *Sumbhoochunder Chowdry* v. *Naraini Debia* (1835), 3 Knapp, 55; 5 W. R. P. C. 100; it was held that the adopted son of the brother of the whole blood was entitled to inherit in preference to the son of a brother of the half-blood. *Kishennath Roy* v. *Hureegobind Roy*, Ben. S. D. A. 1859, p. 18.

[4] *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (1881), 6 C. L. R. 379; 8 C. L. R. 57.

[5] *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (1868), 9 W. R. C. R. 423.

[6] *Lokenath Roy* v. *Shamasconduree*, Ben. S. D. A. 1858, p. 1863.

[7] *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302.

[8] *Mokundo Lall Roy* v. *Bykunt Nath Roy* (1880), 6 Calc. 289; 7 C. L. R. 478.

[9] *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 350).

[10] See *Dalel Kunwar* v. *Ambika Partap Singh* (1903), 25 All. 266.

to the adopted son in the same way as if he had been a son born to his adoptive father.

An hereditary title or honour passes to an adopted son, and his descendants, in the same way as to a legitimate son, or his descendants. Title.

Where the adoption is by a husband alone,[1] or in association with his wife, or one of his wives, or where it has been made to him by his wife with his concurrence, or after his death, the son inherits to the wife,[2] and to her relations,[3] in the same way as if he had been a son born to such wife. Inheritance *ex parte maternâ.*

The right of the adopted son to inherit to the brother,[4] and father,[5] of the adoptive mother has been upheld.

Sir G. D. Banerjee [6] doubts whether in a Mitakshara case an adopted son will inherit his adoptive mother's mother's *stridhan* as he would thereby be preferred to the son of the deceased (*post*, p. 449), but he admits that there is no authority on the subject.

The adoptive mother [7] and her relatives [8] inherit to the adopted son in the same way as if she had been his natural mother.

Where an adoption is made by a husband in conjunction with one only of several wives, or after his death by one of

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[1] See *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255, at p. 257; "Dattaka Mimansa," s. 1, para. 22.

[2] *Teencowree Chatterjee* v. *Denonath Banerjee* (1865), 3 W. R. C. R. 49; *Raje Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (1867), 4 Bom. H. C. A. C. 191. *Contrâ* 2 Bom. S. A. R. 178, cited in "Norton's Leading Cases," I. 101.

[3] *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138; 10 Calc. 232; 13 C. L. R. 379. This decision in effect overrruled *Morun Moee Debeah* v. *Bejoy Kishto Gossamee* (1863), W. R. Sp. No. 121 (so far as this question is concerned), and *Chinnaramakristna Ayyar* v. *Minatchi Ammal* (1873), 7 Mad. H. C. 245. *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255; *Surjokant Nundi* v. *Mohesh Chunder Dutt* (1882), 9 Calc. 70; *Radha Prasad Mullick* v. *Ranee Mani Dassee* (1906), 33 Calc. 947; 10 C. W. N. 695 (reversed on another point (1908), 35 I. A. 118; 35 Calc. 896; 12 C. W. N. 729; 10 Bom. L. R. 604).

[4] *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (1883), 10 I. A. 138; 10 Calc. 232; 13 C. L. R. 379.

[5] *Sham Kuar* v. *Gaya Din* (1876), 1 All. 255; *Surjokant Nundi* v. *Mohesh Chunder Dutt* (1882), 9 Calc. 70.

[6] "Law of Marriage," 3rd ed., pp. 364, 365, 428.

[7] *Anandi* v. *Hari Suba Pai* (1909), 33 Bom. 404; 11 Bom. L. R. 641. See *Ramasawmi Aiyan* v. *Vencataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91; *Annapurni Nachiar* v. *Forbes* (1899), 26 I. A. 246; 23 Mad. 1; 3 C. W. N. 730; *Jatindra Nath Chaudhuri (Rai)* v. *Amrita Lal Bagchi* (1900), 5 C. W. N. 20; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319.

[8] *Gungapersad Roy* v. *Brijessuree Chowdhrain*, Ben. S. D. A. 1859, p. 1091.

several wives, the adopted son [1] inherits only to that wife and her relations, his relationship to the other wives being that of a step-son.

It is unsettled whether, when in Bengal a man adopts in conjunction with more than one wife,[2] or where two or more widows adopt in Western India jointly,[3] the adopted son inherits to all the widows so adopting and their relatives. As pointed out in *Venkata Narasimha Appa Row Bahadur* (*Sri Raja*) v. *Parthasarathy Appa Row Bahadur* (*Sri Raja*) (1913), 41 I. A. 51, at p. 69; 37 Mad. 199, at p. 220; 18 C. W. N. 554, at p. 563; 16 Bom. L. R. 328, at p. 337, the difficulty in supposing that he inherits to all the widows is very great. This seems to show that except perhaps in Western India no such joint exercise of the power is possible (*ante*, p. 115).

The mere concurrence by a widow in an adoption by her co-widow would not, it is submitted, confer upon the adopted son any rights of inheritance to her or her relations.

Although it is unsettled it seems that when a husband adopts in spite of his wife's express dissent, the son does not inherit to her or to her relations.[4]

Adopted son of disqualified man.

A son adopted by a man who is disqualified from inheritance by reason of a personal disability, such as congenital blindness, impotence, or lameness,[5] cannot acquire greater rights than his adoptive father, and therefore cannot inherit to any one from whom the adoptive father was disqualified from inheriting.[6]

There is, it is submitted, nothing to prevent his inheritance from his adoptive father [7] and from his adoptive mother and her relations. According to the "Dattaka Chandrika" [8] he is entitled to maintenance.

Descendants of adopted son.

The descendants of an adopted son born after adoption have the same rights of inheritance as the descendants of a legitimately begotten son.[9]

As to the case of an adoption of a married man having a son, see *post*, p. 190.

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[1] *Annapurni Nachiar* v. *Forbes* (1899), 26 I. A. 246; 23 Mad. 1; 3 C. W. N. 730; S. C. in Court below, (1895), 18 Mad. 277; *Kasheeshuree Debia* v. *Greeschunder Lahoree*, W. R. 1864, p. 71.

[2] See *ante*, p. 112.

[3] See *ante*, pp. 115, 126.

[4] See Sarkar's "Law of Adoption," 2nd ed., pp. 215, 419D–419F.

[5] *Ante*, p. 109, and *post*, pp. 370–373.

[6] "Mitakshara," chap. ii. s. x. para. 10; "Dattaka Chandrika," s. vi. para. 1; "Daya-Bhaga," chap. v. s. 19; Mayne's "Hindu Law," 8th ed., p. 136; Sarkar's "Law of Adoption," pp. 202, 203, 419. As to the right of a natural son, see *post*, p. 373.

[7] Sutherland's "Synopsis," Stokes' "Hindu Law Books," pp. 664, 671.

[8] Sec. vi. para. 1. This is disputed in Sarkar's "Law of Adoption," p. 419.

[9] *Kishennath Roy* v. *Hurreegobind Roy*, Ben. S. D. A. of 1859, p. 18; *Gourhurree Kubraj* v. *Rutnasuree Debia* (*Mussummut*) (1837), 6 Ben. Sel. R. 203 (new edition, 250).

Rights no greater than those of son born.

An adopted son does not, as such, acquire any rights greater than those of a begotten son.[1]

Adoption does not alter father's powers over property.

The adoption of a son does not interfere with the powers of the adoptive father to dispose of [2] the property over which he has a power of disposition.[3]

An adoptive father can defeat the rights of inheritance of his adopted son,[4] whether the property held by him be partible or impartible.[5] He can, in giving a power of adoption, require as a condition of the exercise of the power that the estate of his widow should not be interfered with,[6] and might apparently impose such other conditions as are not inconsistent with the provisions of the law of gifts and wills.[7]

Adoption does not revoke will.

In cases governed by the Hindu Wills Act, adoption, or the giving of a power of adoption, does not operate as a revocation of a will.[8]

There is some authority that in other cases a Hindu has no power to completely disinherit his adoptive son, and that a will making no provision for adopted sons would be invalidated by a power given subsequently,[9] but it is submitted that there is no reason why an adoption should have greater effect than the birth of a son in revoking a will. Where the will purports to deal with property, over which the adopting father ceased to have a power of disposition on the birth or adoption of a son, it would

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[1] *Venkata Surya Mahipati Rama Krishna Rao Bahadur (Sri Raja Rao)* v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; 1 Bom. L. R. 277; *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at pp. 310, 311; 3 W. R. P. C. 15, at p. 18.

[2] By will, gift, or transfer.

[3] See *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (1915), 43 I. A. 12; 43 Calc. 432; 20 C. W. N. 169; 18 Bom. L. R. 347.

[4] *Venkata Surya Mahipati Rama Krishna Rao Bahadoor (Sri Raja)* v. *Court of Wards* (1899), 26 I. A. 83, at p. 89; 22 Mad. 383, at p. 390; 3 C. W. N. 415, at p. 421; 1 Bom. L. R. 277; *Rungama* v. *Atchama* (1846), 4 M. I. A. 1, at p. 103; 7 W. R. 57, at p. 62; *Surendra Nath Ghose* v. *Kala Chand Banerjee* (1907), 12 C. W. N. 668; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (1871), 8 Bom. H. C. (O. C.) 196; *Sudanund Mohapattur* v. *Bonomallee* (1863), Marsh, 317; 2 Hay, 205.

[5] *Venkata Surya Mahipati Rama Krishna Rao Bahadoor (Sri Raja Rao)* v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51; 10 All. 272.

[6] See *Bepin Behari Bundopadhya* v. *Brojonath Mookhopadhya* (1882), 8 Calc. 357; *Radhamonee Debea* v. *Jadubnarain Roy*, Ben. S. D. A. of 1855, p. 139; *Prosunnomoyee (Ranee)* v. *Ramsoonder Sein*, Ben. S. D. A. of 1859, p. 162.

[7] See *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10; *ante*, pp. 114, 116.

[8] Act XXI. of 1870, s. 2, read with Act X. of 1865, s. 57.

[9] See *futwah* of pundits in *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1856), 6 M. I. A. 309, at p. 320, referred to by Couch, C. J., in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224, at p. 230.

be ineffectual to deal with the property [1] except where assent to the provisions of the will was a condition of the adoption.[2]

Arrangement restraining disposition.

Effect would apparently be given to an arrangement made at the time of the adoption stipulating that the adoptive father should not exercise his powers of disposition or undertaking to settle property on the boy. Such arrangement can be enforced at the instance of the adopted son.[3]

Coparcenary property.

In cases governed by the Mitakshara law, the adoptive father has no power to destroy the adopted son's right of survivorship in coparcenary property.[4]

Illustration.

A made a will disposing of his ancestral property with regard to which he was the sole coparcener, and authorized his widow to adopt a son in a certain event. In a subsequent will he did not revoke this authority, but disposed of the property inconsistently with the first will. The later will was set aside, on the ground that the testator had no power of disposition, he having ceased to be sole coparcener.[5]

Arrangement limiting interest in ancestral property.

When, after attaining the age of majority, an adopted son ratifies an arrangement made between his natural father and the person adopting him limiting the interest in coparcenary property which he would acquire by adoption, he is bound by the arrangement.[6] It is unsettled whether, in the absence of such ratification, he can be bound by such arrangement, but it is submitted that if the arrangement be a fair one, and does not unduly interfere with the rights of the adopted son, effect

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[1] As the will must be taken to speak from the death of the testator, at which time he would have no disposing power.

[2] See *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224.

[3] See *Surendrakeshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108, at p. 132; 19 Calc. 513, at p. 536; *Bhala Nahana* v. *Parbhu Hari* (1877), 2 Bom. 67.

[4] *Ganapati Aiyyan* v. *Savithri Ammal* (1897), 21 Mad. 10, at pp. 14, 15; *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6. See Hindu Wills Act (XXI. of 1870), s. 3; Probate and Administration Act (V. of 1881), s. 4; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438; *Lakshmi Shankar* v. *Vaijnath* (1881), 6 Bom. 24; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. H. C. 31; *Buldeo Singh (Rajah)* v. *Koonwer Mahabeer Singh* (1866), 1 Agra, H. C. 155; *Narottam Jagjiwan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. (A. C. J.) 6; *Gangubai* v. *Ramanna* (1866), 3 Bom. H. C. (A. C. J.) 66.

[5] *Venkatanarayana Pillai* v. *Subbammal* (1915), 43 I. A. 20; 39 Mad. 107; 20 C. W. N. 234; 17 Bom. L. R. 468.

[6] See *Ramasawmi Aiyyan* v. *Vencataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91; *Kashibai* v. *Tatya* (1916), 40 Bom. 668; 18 Bom. L. R. 740.

will be given to it, at any rate when the arrangement is made with the adoptive father or is authorized by him.[1]

As the adoptive father is competent to exclude his adopted son by his will, there can be no objection to his making any arrangement as to the devolution of property over which he has a power of disposition, either at the time of adoption or thereafter.[2]

The Madras High Court has upheld dispositions of ancestral property by the adopting father with the consent of the natural father for the purpose of providing for the maintenance of the wife of the adopting father.[3]

In another case [4] the Bombay High Court held that when the adopted son and the person who gave him in adoption were fully cognizant of the disposition of the property made by the testator, and with the knowledge of such disposition, the natural father consented to the adoption taking place, and when the disposition and the adoption might, under the circumstances, be regarded as one transaction, the disposition, though contained in a will, could not be repudiated by the adopted son. "The principle underlying the decision is that the disposition was one which it was competent to the testator to make prior to the adoption, and that its acceptance being presumably a condition subject to which the adoption was made, it made no difference that the disposition was testamentary." [5]

The Madras High Court upheld an arrangement between the natural father and the adopting mother, where provision was made for the enjoyment of a portion of the property by the mother in the case of her disagreement with the adopted son,[6] but the Bombay High Court has refused [7] to uphold an arrangement whereby the mother could dispose of immovable property, and in another case the same Court declined to give effect to an agreement whereby the adoptive mother retained her rights as a widow during her lifetime.[8]

Where by the arrangement property is given to a daughter [9] or brother of the adoptive mother,[10] the adopted son is not bound by it.

In *Ramasawmi Aiyan* v. *Vencataramaiyan*,[11] the Judicial Committee said, "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, is a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh*

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[1] See *Pirsab* v. *Gurappa* (1913), 38 Bom. 227, at pp. 234–236; 16 Bom. L. R. 111, at pp. 116, 117.

[2] *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (1915), 43 I. A. 12; 43 Calc. 432; 20 C. W. N. 169; 18 Bom. L. R. 347. See *Asita Mohon Ghose Moulik* v. *Nirode Mohon Ghose Moulik* (1916), 20 C. W. N. 901.

[3] *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490; *Narayanasami* v. *Ramasami* (1890), 14 Mad. 172. See *Basava* v. *Lingangauda* (1894), 19 Bom. 428.

[4] *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224.

[5] *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490, at pp. 492, 493. See *Ganapati Ayyan* v. *Savithri Ammal* (1897), 21 Mad. 10.

[6] *Visalakshi Ammal* v. *Sivaramien* (1904), 27 Mad. 577.

[7] *Venkappa* v. *Fakirgowda* (1906), 8 Bom. L. R. 346.

[8] *Purshottam* v. *Rakhmabai* (1913), 16 Bom. L. R. 57.

[9] *Vyasacharya* v. *Venkubai* (1912), 37 Bom. 251; 14 Bom. L. R. 1109.

[10] *Venkappa* v. *Fakirgowda* (1906), 18 Bom. L. R. 346.

[11] (1879), 6. I. A. 196, at p. 208; 2 Mad. 91, at p. 101. See *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, at p. 163.

v. *Janaki* [1] certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding." In *Bhaiya Rabidat Singh* v. *Indar Kunwar (Maharani)* [2] the Judicial Committee said, "It is difficult to understand how a declaration by Guman Singh (the natural father) on an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which would only arise when his parental control and authority determined."

It is submitted that the determination of this question depends upon the nature of the particular arrangement. It is scarcely necessary to speculate as to what would happen if the natural father assented to a disposition of the whole of the ancestral property away from the son, as such a case is not likely to occur. If such case did occur, the Courts would probably hold that the natural father acted in excess of his powers, and that his son was not bound by it; but in dealing with a less extreme case, effect might well be given to a fair arrangement, in which the son distinctly benefits by the adoption. Where the adoptive father is separate from his kinsmen, and has, therefore, a power of disposing by will even of ancestral property, if he has no son, it must be remembered that he is by any such arrangement only doing what it was competent for him to do in the absence of an adoption.

As to a condition contained in the permission to adopt, see *ante*, pp. 116, 117.

There is authority that where there is an express power of adoption given by the husband, the widow cannot originate conditions. If she does so, the adoption would be valid, and the conditions would be ineffectual.[3]

Effect would be given to an arrangement which had been ratified by the boy after attaining majority.[4]

In Bombay it has been held that a widow can, at the time of the adoption, make a fair arrangement for the protection of her interest in the estate during her lifetime.[5] The cases in which this conclusion has been arrived at were not cases in which express power was given by the husband, but cases where the widow exercised the power given to her by the system of Hindu law prevalent in Western India.[6]

When a widow obtains a reservation of rights by such an arrangement, she possesses therein only the ordinary rights of a Hindu widow.[7]

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[1] (1874), 11 Bom. H. C. 199. See *Pirsab* v. *Gurappa Basappa* (1913), 38 Bom. 227; 16 Bom. L. R. 111.

[2] (1888), 16 I. A. 53, at p. 59; 16 Calc. 556, at p. 564.

[3] *Jagannadha* v. *Papamma* (1892), 16 Mad. 400. In *Solukhna (Mussummaut)* v. *Ramdolal Pande* (1811), 1 Ben. Sel. R. 324 (new edition, 434), the pundits considered that an instrument under which the widow remained in possession was inoperative. G. C. Sarkar ("Law of Adoption," p. 408) considered that the widow can make conditions.

[4] See *Kali Das* v. *Bijai Shankar* (1891), 13 All. 391.

[5] *Ravji Vinayakrav Jagannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at pp. 401, 402; *Radhabai* v. *Ganesh Tatya Gholap* (1878), 3 Bom. 7, at p. 8; *Chitko Raghunath Rajadiksh* v. *Janaki* (1874), 11 Bom. H. C. 199.

[6] *Ante*, pp. 124–126.

[7] *Antaji* v. *Dattaji* (1893), 19 Bom. 36.

A widow would apparently have no power to arrange with the natural father to obtain for herself an interest in property which had not been vested in her, as, for instance, in property which, on her husband's death, passed by survivorship to other members of the family, and which is devested by the adoption.[1]

Son born after adoption.

In the case of the twice-born classes where, after an adoption,[2] a son is born to the adoptive father, the adopted son loses all rights to the performance of religious ceremonies, and his rights of inheritance are reduced—

(*a*) If he be governed by the Bengal school, to one-half of the share of a lawfully begotten son.[3]

(*b*) If he be governed by the Benares school, to one-third of the share of a lawfully begotten son.[4]

The "Dattaka Mimansa" (sec. 5, par. 40) gives the adopted son a fourth share.

(*c*) If he be governed by the schools prevailing in Southern India [5] and Bombay,[6] to one-fourth of the share of a lawfully begotten son.

In a case of partition of joint family property governed by the Mitakshara law the adopted son, or his son, son's son, or son's son's son, and the after-born son, or his son, son's son, or son's son's son, share in similar proportions.

In a competition, either in a case of inheritance or in a case of partition between an adopted son, and a relation other than

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[1] *Post*, p. 198.

[2] Where the son is born before the adoption then the adoption is invalid, *ante*, p. 103.

[3] "Dayabhaga," x. 9; "Dattaka Chandrika," v. 16–17; Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; Sarkar's "Law of Adoption," p. 398. Consequently, if there be one begotten son the adopted son takes one-third of the whole, if there be two he takes one-fifth, and so on.

[4] Sir F. Macnaghten's "Considerations on Hindu Law," 137; 1 W. Macn. 70; 2 W. Macn. 184; "Mitakshara," i. 11, 24, 25; "Dattaka Mimansa," x. 1; v. 40. See, however, *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534, which was governed by the Mitakshara law and apparently by the Benares school. The Court there considered that an adopted son takes half the share of a begotten son.

[5] *Ayyavu Muppanar* v. *Niladatchi Ammal* (1862), 1 Mad. H. C. 45.

[6] *Giriapa* v. *Ningapa* (1892), 17 Bom. 100. In the earlier cases the Bombay High Court considered that the share was one-third of the share of a natural-born son; *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105; *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347. In *Giriapa* v. *Ningapa* the Court did not refer to these earlier decisions. See "Vyavahara Mayukha," p. 60, Mandlik's edition. As to *Garbhari Gosavis*, see *Balgir* v. *Dhondgir* (1903), 5 Bom. L. R. 114.

a son, son's son, or son's son's son, the adopted son, etc., receives the same share as he would have taken if he had been a lawfully begotten son.[1]

Sudras.

This rule has no application to Sudras. In their case lawfully begotten and adopted sons take equally.[2]

Shebaitship.

A right to inherit the management of debutter property is governed by the same principles as the inheritance of other property.[3]

In the case of inheritance to *stridhan* property an adopted stepson takes equally with a natural-born stepson.[4]

The birth of a lawfully begotten son would not apparently affect the incapacity of the adopted son to marry in, or adopt from, his adoptive family.

Jains.

The Jain law in this matter coincides with the ordinary Hindu law.[5]

Impartible property.

In the case of impartible property the afterborn son succeeds to the exclusion of the adopted son.[6]

Renunciation or waiver of rights.

An adopted son can renounce his interest in property which becomes vested in him by virtue of his adoption, or may waive any of his rights therein.[7]

On such renunciation the person who would take in default of adoption would succeed to the property.[8]

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1 *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (1915), 43 I. A. 56; 40 Bom. 270; 20 C. W. N. 702; 18 Bom. L. R. 172; *Gangadhar Bogla* v. *Hira Lal Bogla* (1916), 43 Calc. 944; 20 C. W. N. 489 (inheritance to the *stridhan* of a stepmother).

2 *Raja* v. *Subbaraya* (1883), 7 Mad. 253, at p. 254; *Asita Mohon Ghose Moulik* v. *Nirode Mohon Ghose Moulik* (1916), 20 C. W. N. 901; *Bramanund Mahunty* v. *Chowdhry Krishna Churn Patnaik* (1882), unreported case referred to in G. C. Sarkar's "Law of Adoption," p. 403. The rule was apparently unknown to Sir F. Macnaghten, who, in dealing with a case of Sudras (*Gopee Mohun Deb* v. *Raja Rajkrishna*, "Considerations on Hindu Law," 233), expressed the opinion that the adopted son was entitled to one-third of the estate. In *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 25; 3 C. L. R. 534 (*ante*, p. 187. note 4), the parties were Sudras. See "Dattaka Chandrika," s. 5, paras. 29–32; "Vyavastha Darpana," pp. 913–915 (this is a digest of the Hindu law current in Bengal); "Vyavastha Chandrika" (a digest of Hindu law current in all the Provinces of India, except Bengal proper), vol. i. p. 169; Sarkar's "Law of Adoption, pp. 402, 403; W. Macnaghten's "Hindu Law," vol. i. 70, note; Strange's "Hindu Law," p. 99.

3 *Asita Mohon Ghosh Moulik* v. *Nirode Mohon Ghosh Moulik* (1916), 20 C. W. N. 901.

4 *Gungadhur Bogla (Kumar)* v. *Hira Lal Bogla (Kumar)* (1916), 20 C. W. N. 489.

5 *Rukhab* v. *Chunilal Ambushet* (1891), 16 Bom. 347.

6 *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (1894), 17 Mad. 422, at p. 435; S. C. affirmed on appeal, *Sundaralingasawmi Kamaya Naik* v. *Ramasawmi Kamaya Naik* (1899), 26 I. A. 55; 22 Mad. 515; 1 Bom. L. R. 850.

7 W. Macnaghten's "Hindu Law," vol. ii. pp. 183, 184. He cannot renounce his status as an adopted son, *ante*, p. 157.

8 *Mahadu Ganu* v. *Bayaji* (1893), 19 Bom. 239; *Ruvee Bhudr* v. *Roopshunker Shunkerjee* (1829), 2 Borr. 656, at pp. 665, 671.

There is nothing to prevent an adopted son making over his rights in the property, or in a portion thereof, to his adoptive mother or to any one else after he has attained majority.[1]

Exclusion from rights in natural family.

Except when he has been adopted as a *dvyamushyayana*,[2] an adopted son loses by his adoption all rights as the son of his natural father and mother.[3]

He cannot inherit to the members of his natural family,[4] except he has such right as the son of his adoptive father,[5] and they cannot inherit to him.[6]

It may happen that he loses the right to succeed to his natural mother and her relatives, and does not acquire a new mother, or maternal relatives for spiritual or temporal purposes, as where the adoption is by a bachelor, or a widower,[7] or perhaps where the adoption is made in spite of the express dissent of the wife of the adoptive father.[8]

An adopted son on adoption ceases to be liable for the debts [9] or other obligations for which he would have been liable as a member of his natural family.

Punjab.

In parts of the Punjab the rights of the adopted son in his natural family take effect if his natural father dies without leaving legitimate sons.[10]

Property vested before adoption.

It has been held that according to the Bengal school adoption does not devest any property which has vested in the adopted son by inheritance, gift, or any form of self-acquisition previous to the adoption.[11]

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[1] *Tara Munee Dibia (Mussummaut)* v. *Dev Narayun Rai* (1824), 3 Ben. Sel. R. 387 (2nd ed., 516); 2 Macn., pp. 183, 184. See *Bhugobutty Dayee (Mussamut)* v. *Chowdhry Bholanath Thakoor* (1871), 15 W. R. C. R. 63; *Mahadu Ganu* v. *Bayaji* (1893), 19 Bom. 239.

[2] *Post*, pp. 190, 191.

[3] "Manu," chap. ix. para. 142; "Dattaka Mimansa," s. 6, paras. 6–8; "Dattaka Chandrika," s. 2, paras. 18–20; "Mitakshara," chap. i. s. 11, para. 32; "V. Mayukha," chap. iv. s. 5, para. 21.

[4] W. Macnaghten's "Hindu Law," vol. i. p. 69.

[5] For an instance of this, see *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108, where the natural father took as heir to the son whom he had given in adoption.

[6] *Duttnaraen Sing* v. *Ajeet Sing* (1799), 1 Ben. Sel. R. (new edition, 26); *Muthayya Rajagopala Thevar* v. *Minakshi Sundara Nachiar* (1901), 25 Mad. 394; *Srinivasa Ayyangar* v. *Kuppan Ayyangar* (1863), 1 Mad. H. C. 180; *Gunga Persad Roy* v. *Brijessuree Chowdhrain*, Ben. S. D. A. 1859, p. 1091.

[7] *Ante*, p. 106.

[8] *Ante*, pp. 111, 112, 182.

[9] *Pranvullubh* v. *Deokristn* (1824), Bom. Sel. R. 4; *Kasheepershad* v. *Bunseedhur*, 4 N. W. P. (S. D.) 343.

[10] "Punjab Customary Law," iii. p. 83; "Punjab Cust.," 81.

[11] *Behari Lal Laha* v. *Kailas Chunder Laha* (1896), 1 C. W. N. 121. As, for instance, where he has acquired property by the will of a natural relation, or by succession to a maternal grandfather, or it may be even by inheritance from his natural father, as was the case in *Papamma* v. *V. Appa Rau* (1893), 16 Mad. 384, although the question as to whether it was devested did not arise in that case.

The Madras High Court [1] has held that under the Mitakshara property vested solely and absolutely in the adopted son is not devested; but in the case of inherited property a different view has been taken in Bombay.[2] In the second edition of his "Law of Adoption" pp. 419A to 419C, Sastri G. C. Sarkar expressed the opinion that adoption operates as a civil death in the natural family, and that property inherited is thereby devested. This was the view accepted in Bombay. A different view was taken by Sastri G. C. Sarkar in the first edition of his work (pp. 389, 390). The question depends upon the construction of the text of *Manu* (142), Max Müller's translation, p. 355. "An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) leave (as far as that son is concerned)." The case in question can scarcely come within *Manu's* text as *Manu* would not have contemplated an only son being given in adoption. It is submitted that the case is governed by what is the ordinary rule of Hindu law, viz. that property once vested by inheritance cannot be devested.

He would lose such rights as he might have had in coparcenary property as a member of a joint family governed by the Mitakshara school of law.[3] When the property had been partitioned and a share had vested in him by virtue of the partition, it has been held that he would retain his rights in it in spite of the adoption, and where the family property had vested in him as the only surviving member of a joint family, it would not be devested by his adoption.[4]

When a married Hindu, having a son, is taken in adoption, the son does not, like his father, lose the *gotra* and rights of inheritance in the family of his birth.[5]

Dvyamushyayana.

A boy can be adopted, so as to retain his relationship to his natural father, while acquiring the relationship of a son to his adoptive father. He is then said to be *Dvyamushyayana* [6] (or son of two fathers).

A boy adopted in Mithila by the *Kritrima* form of adoption is also treated as the son of two fathers.[7]

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[1] *Venkata Narasimha Appa Row (Sri Rajah)* v. *Rangayya Appa Row (Sri Rajah)* (1905), 29 Mad. 437. On appeal in this case the question did not arise, 41 I. A. 51; 37 Mad. 199; 17 C. W. N. 124; 15 Bom. L. R. 1010.

[2] *Dattatraya* v. *Govind* (1916), 40 Bom. 429; 18 Bom. L. R. 258. See 19 Bom. L. R. Journal, 1.

[3] *Ante*, p. 179.

[4] *Venkata Narasimha Appa Row (Sri Rajah)* v. *Rangayya Appa Row (Sri Rajah)* (1905), 29 Mad. 437; differed from in *Dattatraya* v. *Govind* (1916), 40 Bom. 429; 18 Bom. L. R. 258.

[5] *Kalgavda Tavanappa* v. *Somappa Tamangavda* (1909), 33 Bom. 669; 11 Bom. L. R. 797.

[6] Literally two persons. See Sutherland's "Synopsis," head fifth. The practice of adopting a son as *dvyamushyayana* seems to have originated from the obsolete practice of *niyoga*. The *dvyamushyayana* son, treated of in the "Mitakshara," chap. i. s. 10, is the son begotten in accordance with that practice.

[7] *Ante*, pp. 157, 158.

Nitya dvyamushyayana.

Where there is an understanding, or a previous stipulation between the giver and the receiver in adoption, that the boy should belong to both of them, the boy is said to be *nitya dvyamushyayana* [1] (*i.e.* perpetual or absolute son of two fathers).

Adoption of only son.

This arrangement can be made by a widow taking in adoption.[2]

The authorities show that where an only son has been adopted by a united brother of his father it is presumed that there was an arrangement that he was to be *dvyamushyayana.*[3] It does not seem to be very clear whether this rule applies only to the adoption of an only son of a brother, or whether it is applicable to all only sons.[4] It applies to adoption by widows of brothers.[5]

As it has now been held that an only son can be adopted in the *Dattaka* form,[6] the only advantage in adopting a boy as a *dvyamushyayana* is that the boy is not removed entirely from his natural family; but a boy so adopted could not secure the salvation of the person adopting as

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[1] See *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Opinions of pundits in *Haimun Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koomer*) (1834), 2 Knapp, 203, at pp. 206–288; *Joymoney Dossee* (*Sreemutty*) v. *Sibosoondry Dossee* (*Sreemutty*) (1837), Fulton, 75; *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (1816), 2 Ben. Sel. R. 189 (2nd ed., 216); 2 W. Macn. 192, 193; Strange's "Hindu Law," vol. i. p. 86; W. Macnaghten's "Hindu Law," vol. ii. 192; "Dattaka Mimansa," s. 6, para. 48; "Dattaka Chandrika," s. 2, para. 24.

[2] *Krishna* v. *Paramshri* (1901), 25 Bom. 537; 3 Bom. L. R. 73.

[3] *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at p. 454; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. *Contrà Laxmipatirao* v. *Venkatesh* (1916), 41 Bom. 315; 19 Bom. L. R. 23. See opinions of pundits in *Haimun Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koomer*) (1834), 2 Knapp, 203, at pp. 206–208; *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 3 B. L. R. P. C. 27, at p. 32; 12 W. R. P. C. 29, at p. 31.

[4] Mr. Mayne, in his "Hindu Law" (8th ed., p. 231), applies this rule only to the son of a brother. See also *Gocoolanund Dass* v. *Wooma Daee* (1875), 15 B. L. R. 405, at pp. 415, 416; 23 W. R. C. R. 340, at p. 341; S. C. on appeal, *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Sastri G. C. Sarkar ("Law of Adoption," p. 377) says, "It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage ('Dattaka Mimansa,' ii. 39) he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the 'Mitakshara' with respect to the analogous case of a son produced by a man other than the brother on another man's wife. The 'Dattaka Chandrika,' however, does not appear to limit the *dvyamushyayana* adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases" ("Dattaka Chandrika," ii. 28; iii. 17; v. 33). See also *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542; 3 Bom. L. R. 73.

[5] See *Krishna* v. *Paramshri* (1901), 25 Bom. 537; 3 Bom. L. R. 73. It was not in that case necessary to raise any presumption, as the adoption was proved to have been in the *dvyamushyayana* form.

[6] *Ante*, p. 145.

effectually as a *Dattaka* son.[1] The adoption of a boy as a *dvyamushyayana* under these circumstances seems to have arisen from a desire to reconcile the prohibition against the adoption of an only son with the recommendation to adopt the son of a brother. There is no necessity to evade a prohibition which has now been held to have no legal force.

In some parts of India a *nitya dvyamushyayana* seems to be quite obsolete.[2] It is obsolete on the east coast, but is said to be the ordinary form of adoption recognized in Malabar and amongst the Nambudri Brahmins.[3] The practice has been held by the Bombay High Court to exist among Lingayets, whether the brothers are divided or joint.[4]

It is said to be not at all unusual in the southern districts of the Bombay Presidency,[5] and it has been recognized by the Judicial Committee in two cases from Bengal,[6] and by the Allahabad High Court in a case from Bareilly.[7]

Anitya dvyamushyayana.

When from a different *gotra* (family) a boy was adopted after he has been initiated into the ceremony of tonsure in the *gotra* of his natural father, and was invested with the sacred thread in the *gotra* of his adoptive father, as the rites of initiation have been performed by both fathers, he was termed *anitya dvyamushyayana* [8] (*i.e.* temporary son of two fathers). The *anitya dvyamushyayana* is unknown to modern Hindu law.[9]

Inheritance in case of dvyamushyayana.

The forms and conditions of *dvyamushyayana* adoption are the same as in other cases, where the adoption is in the *Dattaka* form.[10] The boy adopted inherits both in the family in which he was born and in the family of his adopter.[11]

The issue of the *anitya dvyamushyayana* seem to have reverted to their father's natural family.[12] As in the case of a *nitya dvyamushyayana*

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[1] *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 454, 456; *Chenava* v. *Basangavda* (1895), 21 Bom. 105, at pp. 108, 109.

[2] Strange's "Manual," 2nd ed., para. 94; V. N. Mandlik, p. 506; Mad. Dec. of 1859, p. 81; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 454, 455.

[3] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 167, 179.

[4] *Chenava* v. *Basangavda* (1895), 21 Bom. 105.

[5] Steele's "Law and Custom," 45, 47, 183, 384; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 466, 467; *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 543; 3 Bom. L. R. 73.

[6] *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 12 W. R. P. C. 29, at p. 31; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58.

[7] *Behari Lal* v. *Shib Lal* (1904), 26 All. 472.

[8] See *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (*Ranee*) (1816), 2 Ben. Sel. R. 189; 2nd ed., 216, at p. 221.

[9] See Mayne's "Hindu Law," 8th ed., p. 231.

[10] *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542; 3 Bom. L. R. 73. See Sarkar's "Law of Adoption," p. 376.

[11] See "Vyavahara Mayukha," chap. iv. s. 5, para. 25.

[12] W. Macnaghten's "Hindu Law," vol. i. p. 71, referred to in *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. See "Dattaka Mimansa," s. 6, paras. 41–44; Strange's "Hindu Law," vol. ii. pp. 122, 123.

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The forms and conditions of *dvyamushyayana* adoption are the same as in other cases, where the adoption is in the *Dattaka* form.[10] The boy adopted inherits both in the family in which he was born and in the family of his adopter.[11]

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[1] *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 454, 456; *Chenava* v. *Basangavda* (1895), 21 Bom. 105, at pp. 108, 109.

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[3] *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at pp. 167, 179.

[4] *Chenava* v. *Basangavda* (1895), 21 Bom. 105.

[5] Steele's "Law and Custom," 45, 47, 183, 384; *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at pp. 466, 467; *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 543; 3 Bom. L. R. 73.

[6] *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 12 W. R. P. C. 29, at p. 31; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58.

[7] *Behari Lal* v. *Shib Lal* (1904), 26 All. 472.

[8] See *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (*Ranee*) (1816), 2 Ben. Sel. R. 189; 2nd ed., 216, at p. 221.

[9] See Mayne's "Hindu Law," 8th ed., p. 231.

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[12] W. Macnaghten's "Hindu Law," vol. i. p. 71, referred to in *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at p. 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. See "Dattaka Mimansa," s. 6, paras. 41–44; Strange's "Hindu Law," vol. ii. pp. 122, 123.

the adoption is complete, it is submitted that the issue inherit in the adoptive family, and in that family only.[1]

Failing near heirs, the natural mother[2] and other natural relations will inherit to a man adopted in this form.

Sastri G. C. Sarkar ("Law of Adoption," 2nd ed., p. 383) says, "A difficult question arises when such a son dies, after inheriting property from both adoptive and natural fathers. It is reasonable that both the mothers should inherit the respective shares of the property inherited by the son from their respective husbands."

If a son is born to the natural father, the *dvyamushyayana* son takes half of what the after-born son takes. If a son is born to his adoptive father, he takes half of an adopted son's share.[3] After-born son.

The "Mayukha" says,[4] "If both have legitimate sons, he offers an oblation to neither, but takes a quarter of the share allotted to a legitimate son of his adoptive father."

Adoption by a widow vests in the adopted son (as the heir of her husband) the estate vested in her as widow,[5] or as mother of a deceased son,[6] or vested in her co-widow,[7] as Vesting and devesting of estate.

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[1] See Sutherland's "Synopsis of Law of Adoption," head v.; R. Sarvadhikari's "Law of Inheritance," p. 533. Sastri G. C. Sarkar says ("Law of Adoption," p. 376) that the descendants continue to belong to both the *gotras* or families.

[2] See *Behari Lal* v. *Shib Lal* (1904), 26 All. 472.

[3] G. C. Sarkar's "Law of Adoption," p. 403; "Dattaka Chandrika," s. 5, paras. 33, 34. As to what is such share, see *ante*, p. 187.

[4] IV. 5, para. 35. See Mayne's "Hindu Law," 8th ed., p. 232.

[5] See *Mondakini Dasi* v. *Adinath Dey* (1890), 18 Calc. 69; *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 185; *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160, at p. 164; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143, at p. 152; *Collector of Bareilly* v. *Nuraen Day* (*Musst.*) (1868), 3 Agra, 349. It does not affect her *stridhan* property.

[6] *Jatindra Nath Chaudhuri* (*Rai*) v. *Amrita Lal Bagchi* (1900), 5 C. W. N. 30; *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (1887), 11 Bom. 381, at p. 397; *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Lakhmi Chand* v. *Gatto Bai* (1886), 8 All. 319. See *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 9; 1 Mad. 174, at p. 186; 26 W. R. C. R. 21, at p. 23; *Ramasawmi Aiyah* v. *Vencataramaiyan* (1879), 6 I. A. 196, at p. 208; 2 Mad. 91, at p. 101; *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392. A contrary opinion was expressed in *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (1875), 24 W. R. C. R. 183, and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (1875), 5 Calc. 615, in the former of which cases the question did not directly arise, and in the latter the decision was set aside by the Judicial Committee upon another ground (*Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302). See G. C. Sarkar's "Law of Adoption," p. 411.

[7] *Mondakini Dasi* v. *Adinath Dey*

widow,[1] subject to a right of maintenance;[2] but, with these exceptions, it does not devest any estate of inheritance which has been taken by a person, as heir of a male holder other than the person to whom the adoption was made.[3]

This proposition applies only to cases governed by the Bengal school of law, and to property which has passed by inheritance under the Mitakshara system. It has no application to coparcenary property held by the members of a joint family under the Mitakshara school, as to which, see *post*, p. 198.

Illustrations.

(i.) A, governed by the Bengal school of law, dies, leaving a son B, and a widow C, and having given to C a power to adopt a son in case of failure of male issue. B dies, leaving a widow D. C adopts E. E cannot oust D.[4]

(ii.) A, the owner of an impartible zemindari, dies, leaving a son B, and a widow C. B dies unmarried. C validly adopts D. D can oust C.[5]

(iii.) A, a separated Hindu, governed by the Mitakshara law, dies, leaving a widow B, and a son C by another wife. C dies unmarried, and thereupon B adopts D. D cannot oust the heir of C who had succeeded on C's death.[6]

(iv.) A, governed by the Bengal school of law, dies, leaving a widow B,

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(1890), 18 Calc. 69; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 118, at p. 192; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Amava* v. *Mahadgauda*, 22 Bom. 416; *Ramji* v. *Ghamau* (1879), 6 Bom. 498.

[1] Where the estate is vested in the co-widow as heir to her son it cannot be so devested; *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565; *Anandibai* v. *Kashibai* (1904), 28 Bom. 461.

[2] *Dhurm Das Pandey* v. *Shama-soondri Dibiah* (1843), 3 M. I. A. 229, at p. 243; 6 W. R. P. C. 43, at p. 45.

[3] *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18; S. C. in Court below, *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (1881), 7 Calc. 178; 8 C. L. R. 401; *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295; *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (*Mussumat*) (1843), 3 M. I. A. 229; 6 W. R. P. C. 43; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551; *Dharnidhar* (*Shri*) v. *Chinto* (1895), 20 Bom. 250; *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331; *Chandra* v. *Gojarabai* (1890), 14 Bom. 463; *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108; *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; estate of grandmother, *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 246; estate of mother, *Anandibai* v. *Kashibai* (1904), 28 Bom. 461; 6 Bom. L. R. 464; estate of daughter, *Lakshmibai* v. *Vishnu Vasudev Bele* (1905), 29 Bom. 410; 7 Bom. L. R. 436, and cases below, notes 1–3, and *post*, p. 195, notes 4–9.

[4] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ram Kishore Acharj Chowdhry* (1865), 10 M. I. A. 279; 3 W. R. P. C. 15.

[5] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Naisayya* (1876), 4 I. A. 1; 1 Mad. 174.

[6] *Annammah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108.

and a son C by another wife, and a mother D. C dies unmarried, and thereupon B adopts E. E cannot oust D who had succeeded on C's death.[1]

(v.) A, governed by the Bombay law, dies, leaving a widow B, and an undivided son C. C dies, leaving a widow D and a son E, who subsequently dies. On E's death, B adopts F. F cannot oust D.[2]

(vi.) A and his sons B and C were members of an undivided family, governed by the Bombay law. B died, leaving a widow D ; then A died. On A's death, C became the last surviving member of the coparcenary. C died, leaving a widow E. After C's death, D, having express authority to adopt, adopted F. F cannot oust E.[3]

(vii.) A dies, leaving three widows and B the wife of a son who had predeceased him. B adopts C. C cannot oust the widows.[4]

(viii.) A and B were undivided brothers, governed by the Mitakshara school. A dies, leaving a widow C. B dies, leaving a widow D. C adopts E. E cannot oust D.[5]

(ix.) A, governed by the Bengal school, dies, leaving a widow B, and a daughter C, and a brother's son D. C dies, then D dies, having given to his widow E a power of adoption. Then B dies. Afterwards E adopts F. F has no right to the property.[6]

(x.) A, governed by the Mitakshara, dies, leaving two widows B and C, and a son D by B. He authorized C to adopt a son in the event of D dying unmarried. D died unmarried. C adopted a son E, to which adoption B was not a party. E cannot oust B who succeeded as heir to her son.[7]

(xi.) A, governed by the Bengal school, dies, leaving a widow B, and two brothers C and D. C dies, leaving a son E. D dies, leaving a widow F, and having given her a power of adoption. After B's death, F adopts G. G cannot compel E to give him half the property.[8]

As to *vatan* property, see *Bhimabai* v. *Tayappa Murarrao* (1913), 37 Bom. 598 ; 15 Bom. L. R. 783.

In *Kalidas Das* v. *Krishan Chandra Das*,[9] Peacock, C.J.,

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[1] *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 246.

[2] *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94.

[3] *Chandra* v. *Gojarabai* (1890), 14 Bom. 463. If D had adopted before C's death F would have been entitled to share with C, *idem*, at p. 466, on the authority of *Raghunada (Sri)* v. *Brozo Kishoro (Sri)* (1876), 3 I. A. 154 ; 1 Mad. 69 ; 25 W. R. C. R. 291.

[4] *Dharnidhar (Shri)* v. *Chinto* (1895), 20 Bom. 250.

[5] *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju* (1909), 33 Mad. 229. See *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114.

[6] *Kallyprosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295. If the adoption had taken place during the lifetime of B, F would have succeeded, but on B's death the property must have vested in the then heir of A.

[7] *Faizuddin Ali Khan* v. *Tincowri Saha* (1895), 22 Calc. 565.

[8] If the adoption had taken place in the lifetime of C then G would have been entitled to share with E; *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18.; S. C. in Court below, *Nilcomul Lahuri* v. *Jotrendo Mohun Lahuri* (1881), 7 Calc. 178 ; 8 C. L. R. 401.

[9] (1869), 2 B. L. R. (F. B.) 103, at p. 111 ; 11 W. R. (A. O. J.) 11, at p. 13.

said, "There is no case in which an estate vested by inheritance can be devested by the adoption of a son by a widow after her husband's death."

Although the judgment proceeded on the circumstance that the person in whom the estate was vested had assented to the adoption, it is said in *Babu Anaji* v. *Ratnoji Krishnarav*,[1] "For the purposes of inheritance the adoption may be considered as relating back to the death of the adoptive father devesting all estates which have during the intermediate period become vested, as it were, conditionally in another." This is, it is submitted, put too broadly. In the same case [2] the Court, in referring to *Sri Raghunada* v. *Sri Brozo Kishoro*,[3] says that "the person whose estate was there devested was a male full owner," but in the case cited the parties were members of a joint undivided family, governed by the Mitakshara law, and the person whose estate was devested had not obtained it by inheritance, but by survivorship.[4]

In *Surendra Nandan Das* v. *Sailaja Kant Das*,[5] expressions are used which would seem to apply to an estate of inheritance, but the Court was there dealing with a case where there had been a succession by survivorship in a family governed by the Mitakshara school of law.

So far as the estate of the donor of a power of adoption is concerned, the only persons whose rights of inheritance are superior to those of his widow are his son, grandson, and great-grandson, during the lifetime of any one of whom no adoption can take place, and an heir of one of such persons, in whom the estate has been vested after his death. When the estate has vested in such heir the power is at an end,[6] and no estate is devested by an attempted exercise of the power.[7]

Invalid adoption.

Where the power is at an end,[8] or from any other reason the adoption is invalid, the adoption does not even devest the interest of the woman who purports to adopt.[9]

Will.

Where the widow takes as devisee under a will her interest is not, in the absence of a provision to that effect, devested by an adoption.[10]

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[1] (1895), 21 Bom. 319, at p. 325.

[2] At p. 324.

[3] (1876), 2 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291.

[4] See *post*, p. 198.

[5] (1891), 18 Calc. 385, at pp. 395, 396.

[6] *Ante*, pp. 130, 131.

[7] *Bhoobun Moyee Debia* (*Mussumat*) v. *Ramkishore Acharj Chowdhry* (1865), 10 M. I. A. 279, at pp. 311, 312; 3 W. R. P. C. 15, at p. 18; *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302; *Thayammal* v. *Venkatarama Aiyan* (1887), 14 I. A. 67; 10 Mad. 205; *Drobomoyee Chowdhrain* v. *Shama Churn Chowdhry* (1885), 12 Calc. 296; *Annamah* v. *Mabbu Bali Reddy* (1875), 8 Mad. H. C. 108; *Keshav Ramkrishna* v. *Govind Ganesh* (1884), 9 Bom. 94.

[8] *Ante*, pp. 130, 131.

[9] *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (1892), 17 Bom. 164.

[10] *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya* (1882), 8 Calc. 357. See *Sarat Chandra Mullick* v. *Kanai Lall Chunder* (1903), 8 C. W. N. 266, at p. 270.

Where there is a provision in a will that the estate of the devisee should be devested on an adoption, and that the adopted son should take the property, such provision might be effectual.[1]

The interest of the widow as executrix is not devested by an adoption.[2]

It is submitted that an estate cannot be devested by the mere consent of the person in whom it is vested.[3] Consent to devesting.

It is submitted that this question depends upon the question whether consent can validate an adoption which is otherwise invalid.[4] If it has not such effect, then the devesting of an estate would, it seems, not be effected by the act of adoption, but only in the way provided by law for the transfer of property.[5]

Even if consent can operate to devest an estate a distinction might well be made between the cases in which the person so consenting is a full owner, and those in which the estate is vested in a qualified owner; in which latter cases the rights of the reversioners could scarcely be prejudiced by the consent.[6]

Even if the then immediate reversioners should also consent, it is by no means clear that the rights of the persons who should become entitled on the succession opening out would be affected.[7]

Where the consent is necessary for the purpose of validating the adoption, as in Madras,[8] or Bombay,[9] effect would be given to it. This question stands on a different footing.

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[1] See *Luckinarain Tagore's* case; Sir F. Macnaghten's "Considerations on Hindu Law," p. 168; Sircar's "Vyavastha Darpana," 2nd ed., p. 842, referred to in *Bhoobun Moyee Debia* (*Mussumat*) v. *Ramkishore Acharjee* (1865), 10 M. I. A. 279, at p. 312; 3 W. R. P. C. 15, at p. 19.

[2] *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (1915), 43 I. A. 12; 43 Calc. 432; 20 C. W. N. 169; 18 Bom. L. R. 347.

[3] The decision in *Annamah* v. *Mabbu Bali Reddy* (1875), 8 Mad. 108, at p. 112, where the estate was vested in the natural father, is express on this subject. See *Dharnidhar* (*Shri*) v. *Chinto* (1895), 20 Bom. 250, at p. 258; *Vasudeo Vishnu Manohar* v. *Ramchandra Vinayak Modak* (1896), 22 Bom. 551, at p. 555. In Bombay a different view was expressed in *Payapa Akkapa Patel* v. *Appanna*, 23 Bom. 327, at pp. 331, 332; *Gopal Balkrishna Kenjale* v. *Vishnu Raghunath Kenjale* (1898), 23 Bom. 250; *Babu Anaji* v. *Ratnoji Krishnarav* (1895), 21 Bom. 319, and *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114, at p. 122; *Bhimappa* v. *Basawa* (1905), 29 Bom. 400; 7 Bom. L. R. 405.

[4] *Ante*, pp. 156, 157.

[5] See Transfer of Property Act (IV. of 1882), s. 123.

[6] This distinction was not made in the Bombay cases (above, note 3), which held that an estate could be devested by consent. In *Payapa Akkapa Patel* v. *Appanna* (1898), 23 Bom. 327; *Shidappa* v. *Ninganganda* (1914), 38 Bom. 724; 14 Bom. L. R. 663; and in *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. (A. C.) 114, the estate was vested in a female having a widow's estate.

[7] See *Bahadur Singh* v. *Mohar Singh* (1901), 29 I. A. 1; 24 All. 94; 6 C. W. N. 169, at p. 174.

[8] *Ante*, pp. 120, 121.

[9] *Ante*, p. 126.

Impartible estate.

The rule prohibiting the devesting of estates applies to impartible estates, the succession to which depends upon inheritance.[1]

Fraud.

The rule is not affected by the circumstance that the adoption has been delayed by fraud, even when the fraud has been practised by a person who has thereby procured the vesting of the estate in him.[2]

Maintenance of widow.

A widow whose estate is devested is entitled to maintenance from the property.[3]

Persons taking after widow.

An adoption prevents the succession of persons who would otherwise take the estate after the widow whose estate is devested.[4]

Devesting of rights acquired by survivorship.

By adoption to a deceased member of a joint family governed by the Mitakshara law a person acquires such interest in the joint family property as he would have acquired if he had been natural born.[5]

Illustration.

A and B, brothers, formed a joint Hindu family governed by the Mitakshara law. A died without male issue, leaving his wife, C, pregnant. Then B made a will directing his wife D to adopt a son, then B died. The next day C gave birth to a son E. Then D adopted F. F became entitled to share the property with E.[6]

Adoption would not, however, devest estates which had passed by inheritance from those who had acquired rights by survivorship.[7]

Impartible estate.

In the case of an impartible estate, the succession to which is in a

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[1] See *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; *post*, chap. xvii.

[2] *Bhubaneswari Debi* v. *Nilkomul Lahiri* (1885), 12 I. A. 137; 12 Calc. 18; S. C. in Court below, *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (1881), 7 Calc. 178; 8 C. L. R. 401.

[3] *Jamnabai* v. *Raychand Nahalchand* (1883), 7 Bom. 225; *Rakhmabai* v. *Radhabai* (1868), 5 Bom. H. C. A. C. 181, at p. 193. As to the maintenance of a widow, see *ante*, pp. 78, 79.

[4] As, for instance, a daughter, or daughter's son. *Ramkishen Surkeyl* v. *Srimuttee Dibia (Mussummaut)* (1824), 3 Ben. Sel. R. 367 (new edition, 489).

[5] See *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (1880), 7 I. A. 173, at p. 179; 2 Mad. 270, at p. 281; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143, at p. 152; *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385; *Chandra* v. *Gojarabai* (1890), 14 Bom. 463, at p. 467; *Vithoba* v. *Bapu* (1890), 15 Bom. 110, at p. 129; *Bachoo Harkisondas* v. *Mankorebai* (1904), 29 Bom. 51; 6 Bom. L. R. 268; affirmed on appeal (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646.

[6] *Bachoo Harkisondas* v. *Mankorebai* (1909), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646.

[7] *Ante*, pp. 193, 194. See *Rupchand Hindumal* v. *Rakhmabai* (1871), 8 Bom. H. C. A. C. 114; *Chandra* v. *Gojarabai* (1890), 11 Bom. 463.

joint family governed by Mitakshara law, the estate of a person to whom a right has accrued by survivorship may be devested by an adoption to the holder whose rights have so survived.[1]

Power to dispute acts of widow.

An adopted son is not bound by unauthorized alienations[2] made, or acts of waste committed by, the widow adopting him, at the time when the property was vested in her,[3] or after the adoption,[4] or by the manager of the estate.

Thus an alienation made by the widow, even before the adoption, can be set aside at the instance of the adopted son, unless it be made under such circumstances as would bind the reversioners.[5] The Madras High Court[6] has held that even in the case where the transaction be not such as would have bound the reversioners, the alienee is entitled to retain possession during the lifetime or widowhood of the widow, as in the absence of an adoption she was competent to deal with her own personal interest,[7] and the rights of the adopted son do not date before the adoption.[8] There is an unreported decision of the Bombay High Court to the same effect,[9] but other decisions of that Court have clearly held that the adopted

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[1] See *Raghunada (Sri)* v. *Brozo Kishore (Sri)* (1876), 3 I. A. 154; 1 Mad. 69; 25 W. R. C. R. 291, where the estate of an undivided half-brother, who had succeeded to an impartible zemindary, was devested. This case was misunderstood by the Calcutta High Court in *Kally Prosonno Ghose* v. *Gocool Chunder Mitter* (1877), 2 Calc. 295, at p. 309; see *Surendra Nandan Das* v. *Sailaja Kant Das Mahapatra* (1891), 18 Calc. 385, at p. 395.

[2] As to her powers, see *post*, chap. XV.

[3] *Kishenmunee (Ranee)* v. *Oodwunt Singh (Rajah)* (1824), 3 Ben. Sel. R. 220 (new edition, 304); *Sreenath Roy* v. *Ruttunmalla Chowdhrain*, Ben. S. D. A. of 1859, 421; *Bamundoss Mookerjea* v. *Tarinee (Mussamut)* (1858), 7 M. I. A. 169, at p. 180; *Madura (Collector of)* v. *Mootoo Ramalinga Sathupathy* (1868), 12 M. I. A. 397, at p. 443; 1 B. L. R. P. C. 1, at p. 17; 10 W. R. (P. C.) 17, at p. 24; *Lakshman* v. *Radhabai* (1887), 11 Bom. 609; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809, at p. 815; *Natraji Krishnaji* v. *Hari Jagoji* (1871), 8 Bom. H. C. A. C. 67; *Ramakrishna* v. *Tripurabai* (1908), 33 Bom. 88; 10 Bom. L. R. 1029; S. C. *Ramakrishna Kuppaswami* v. *Tripurabai* (1911), 13 Bom. L. R. 940.

[4] *Amibika Partap Singh* v. *Dwarka Prasad* (1907), 30 All. 95; *Antaji* v. *Dattaji* (1893), 19 Bom. 36; *Doorga Sooonduree* v. *Goureepersaud*, Ben. S. D. A. of 1856, p. 170.

[5] Cases above, notes 3 and 4.

[6] *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143. See Sarkar's "Law of Adoption," pp. 417, 418.

[7] *Sahodra (Mussummat Bebea)* v. *Roy Jung Bahadoor* (1881), 8 I. A. 210; 8 Calc. 224; *Gobindmani Dasi* v. *Shamlal Bysak* (1864), B. L. R. Sup. Vol. 48; W. R. 1864, C. R. 165; *Periya Gaundan* v. *Tirumala Gaundan* (1863), 1 Mad. H. C. 206; *Bhagavatamma* v. *Pampanna Gaud* (1865), 2 Mad. H. C. 393; *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866); 3 Mad. H. C. 116; *Ramchandra Mankeshwar* v. *Bhimrav Ravji* (1877), 1 Bom. 577; *Melgirappa* v. *Shivappa* (1869), 6 Bom. H. C. A. C. 270; *Mayaram Bhairam* v. *Motiram Govindram* (1886), 2 Bom. H. C. A. C. 313; *Prag Das* v. *Hari Kishn* (1877), 1 All. 503.

[8] *Ante*, pp. 178, 179.

[9] *Bhaudixit* v. *Ishwardixit*, S. A. No. 146 of 1905.

son can avoid the whole transaction.[1] It is submitted that this latter view is correct.

As to the limitation for a suit to set aside an alienation, see *Amrita Lal Bagchi* v. *Jatindra Nath Chowdhry* (1904), 32 Calc. 165.

It is submitted that the same right to question the acts of the adoptive mother applies where she has succeeded to the estate as mother of a previously adopted son or of a natural born son. In *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*,[2] it was held that the adopted son could not question an alienation made by the widow when she held the estate as mother, and that case was cited with approval in *Kally Prosonno Ghose* v. *Gocool Chunder Mitter*,[3] and in *Lakshman* v. *Radhabai*,[4] but in neither of such two cases did this particular question arise. Mr. Mayne[5] says, as to the first-named decision, "The decision was given without any inquiry as to the propriety of the alienation, and was rested on the authority of *Chundrabullee's* case.[6] It does not seem to have occurred to the Court that a mother had no more than a limited estate, which, upon the authority of the case cited, was devested by the adoption. The son then came in for all rights which had not been lawfully disposed of, or barred, during the continuance of that estate."

It is doubtful whether a widow can, when adopting, stipulate that her management of the property shall not be inquired into. Apparently she would have no such power.[7]

Assent of reversioners.

If at any time before the adoption all the then immediate reversioners assented to the alienation or act of waste, it cannot be questioned by the adopted son.[8]

The adopted son is bound by all acts of the widow within her authority.

A decree against a Hindu widow as representing her husband's estate binds her minor adopted son, and after the adoption an appeal, being for his benefit, must be considered as prosecuted on his behalf, even though he is not made a party thereto.[9]

An adopted son is not entitled to any account of the rents or profits of the estate rightfully received before his adoption by the widow or other person whose estate is devested by his adoption.[10]

Alienation by father under Mitakshara law.

In the case of a joint family governed by the Mitakshara

[1] *Ramakrishna* v. *Tripurabai* (1908), 33 Bom. 88; 10 Bom. L. R. 1029; *Lakshman* v. *Radhabai* (1887), 11 Bom. 609; *Moro Narayan Joshi* v. *Balaji Raghunath* (1894), 19 Bom. 809.

[2] (1875), 24 W. R. C. R. 183.

[3] (1877), 2 Calc. 295, at pp. 307, 308.

[4] (1887), 11 Bom. 609, at p. 615.

[5] "Hindu Law," 8th ed., p. 263.

[6] (1865), 10 M. I. A. 279; 3 W. R. P. C. 15.

[7] See *ante*, pp. 186, 187.

[8] *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar* (1865), 3 W. R. C. R. 14. *Post*, pp. 486, 487.

[9] *Hari Saran Moitra* v. *Bhubaneswari Debi* (1888), 15 I. A. 195; 16 Calc. 40.

[10] See *ante*, p. 178.

law, an adopted son is bound by an alienation made by his adoptive father, or by any other manager of the family, to the same extent as a natural son is bound.[1]

He cannot dispute an alienation made by the adoptive father before his adoption,[2] or any alienation of the separate property of such father.

Bengal school.

In cases governed by the Bengal school of law, an adopted son cannot dispute alienations of property, whether ancestral or self-acquired, made by his adoptive father.[3]

Alienations by male owner.

Where the adoption devests the estate of a male holder,[4] the adopted son cannot question his alienations to the extent of ousting a *bonâ fide* holder for value, nor can he require an account of rents and profits.[5]

He might, perhaps, where the proceeds of the alienation had been earmarked, or not spent, require the alienor to account for such proceeds.

Marriage and adoption in natural family.

Adoption does not sever the tie of blood which exists between the adopted son and the members of his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees,[6] nor can he take in adoption therefrom a boy whom he could not have adopted if he had himself remained in that family.[7]

Effect of *Kritrima* adoption.

A *Kritrima* adoption does not transfer the subject of it from his natural family. It gives him, in addition to his rights in that family,[8] rights of inheritance to the person (man or woman) actually adopting him,[9] and to no one else.[10]

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[1] See *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630, at p. 635. As to the right of a natural son, see *post*, p. 283 *et seq.* As to whether the father can by an arrangement made at the time of the adoption preclude the son from disputing his acts with regard to the property, see *ante*, pp. 184–186.

[2] *Rambhat* v. *Lahskhman Chintaman Mayalay* (1881), 5 Bom. 630.

[3] *Ante*, p. 178.

[4] *Ante*, pp. 194–196.

[5] See *Raghunada* (*Sri*) v. *Brozo Kishoro* (*Sri*) (1876), 3 I. A. 154, at pp 193, 194; 1 Mad. 69, at pp. 83, 84; 25 W. R. C. R. 291, at p. 303.

[6] See *ante*, pp. 44, 45.

[7] *E.g.* he cannot adopt his own natural brother; *Mootia Moodelly* v. *Uppen*, Mad. S. D. 1858, p. 117; Norton, L. C. i. 66, referred to in *Narasammal* v. *Balaramacharlu* (1863), 1 Mad. H. C. 420, at p. 426, note *a*.

[8] *Deepoo* (*Mussummaut*) v. *Gowreeshunker* (1824), 3 Ben. Sel. R. 307 (new edition, 410); *Srinath Serma* v. *Radhakaunt* (1796), 1 Ben. Sel. R. 15, note to p. 16 (new edition, 19, note to p. 21).

[9] *Durgopal Singh* v. *Roopun Singh* (1839), 6 Ben. Sel. R. 271 (new edition, 340); *Deepoo* (*Mussummaut*) v. *Gowreeshunker* (1824), 3 Ben. Sel. R. 307 (new edition, 410).

[10] *Shib Koeree* (*Mussamut*) v. *Joogun Singh* (1867), 8 W. R. C. R. 154; *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); *Collector of*

His sons acquire no right of inheritance to his adoptive father.[1]

If a husband and wife jointly adopt he inherits to both. If the husband adopts one son and the wife another, the sons inherit and offer oblations to each respectively.[2]

This kind of adoption is purely contractual. There is no fiction of a new birth into the adoptive family. The son adopted "does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance."[3]

He may perform the obsequies of his natural father or mother,[4] and also those of his adopters. He would apparently be in the same position as to rights of survivorship in ancestral property in his adoptive family as a natural-born son would be.[5]

EFFECTS OF INVALID ADOPTION.

Effect of invalid adoption.

Where there has been an adoption in form, but such adoption is for any reason invalid, the adopted son does not acquire any rights, as such, in the family of the person purporting to adopt him, except so far as he may be entitled to maintenance.[6]

Decrees against him, and acts by him, would not bind the estate.

The following are the cases of an invalid adoption :—

(i.) Where there is in existence a son begotten or adopted.[7]

(ii.) Simultaneous adoption of more than one son.[8]

(iii.) Adoption of the same boy by two persons.[9]

(iv.) Adoption by a woman without authority.[10]

(v.) Adoption of a boy of a different primary caste.[11]

(vi.) Adoption of a boy within the prohibited decrees.[12]

(vii.) Adoption of a boy where the performance of initiatory ceremonies or marriage before adoption makes the adoption invalid.[13]

Right of maintenance.

It is unsettled whether, on the adoption being set aside, the boy can revert to his natural family, and whether he has any right of maintenance in his adoptive family.

Tirhoot v. *Huropershad Mohunt* (1867), 7 W. R. C. R. 500.

[1] *Juswant Singh (Baboo)* v. *Doolee Chund* (1876), 25 W. R. C. R. 255. They would, of course, possess the ordinary rights of inheritance to property which was vested in their father.

[2] See answers of pundits in *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); W. Macnaghten's "Hindu Law," vol. i. p. 101.

[3] Colebrooke's "Digest," vol. i. p. 276, n.; 1 W. Macnaghten's "Hindu Law," p. 76.

[4] See *Purmessur Dutt Jha (Chowdree* v. *Hunooman Dutt Roy* (1837), 6 Ben. Sel. R. 192 (new edition, 235, at p. 240).

[5] See Sarkar's "Law of Adoption," p. 451.

[6] *Ranjit Singh (Raja)* v. *Ram Chandra Mookerjee* (1899), 4 C. W. N. 415.

[7] *Ante*, pp. 103, 104.

[8] *Ante*, p. 149.

[9] *Ante*, p. 148.

[10] *Ante*, pp. 118, 119.

[11] *Ante*, p. 138.

[12] *Ante*, pp. 138–144.

[13] *Ante*, pp. 146, 147.

In Bengal, if not throughout India, it would seem that a member of one of the regenerate classes who has been invested with the sacred thread in his new family, or a Sudra who has undergone the ceremony of marriage in his new family, cannot revert to his natural family, but he would apparently be entitled so to revert before the happening of those events, and would acquire no rights of maintenance in the new family,[1] at any rate if there had not been a valid giving and receiving.[2] Where the above-mentioned ceremonies have been performed, or where there is a valid giving and receiving, but the adoption is invalid on account of some personal defect, such as the fact that the boy belonged to a different class from that of his adoptive father, there is authority that he would acquire a right of maintenance.[3]

It has been held in Madras that where the adoption was invalid on the ground of want of authority to take, there is no right of maintenance,[4] and that decision has been followed in Bombay.[5]

The difficulty in determining the rights of a person whose adoption is invalid arises from the absence of direct authority on the question as to when (if at all) he can revert to his natural family. An invalid adoption does not *per se* destroy the adopter's rights in his natural family.[6]

Where he can so revert, and loses nothing by the infructuous adoption, no hardship occurs. On the other hand, where he cannot so revert, as when he has been fixed by religious ceremonies in the family of the adopter,[7] or, perhaps, wherever there has been an actual giving and receiving by persons competent to give and receive,[8] it is right that he should, if possible,

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[1] See *Rajcoomaree Dossee (Sreemutty)* v. *Nobocoomar Mullick* (1856), 1 Boulnois, 137; 2 Sevestre, 641, note, in which the Court considered that where there has been no power to take in adoption, the performance of the ceremonies will not prevent a return to the natural family. As to this case, G. C. Sarkar said ("Law of Adoption," p. 424), "We have already seen that the performance of the initiatory ceremonies upon a person in the name of a *gotra* is considered to have the effect of irrevocably fixing his position in that *gotra*, hence a person upon whom these ceremonies have been performed in the name of the adoptive family cannot return to his own, notwithstanding the adoption may be invalid (*Ruvee Bhudr* v. *Roopshunker* (1823), 2 Borrodaile, 656). It is difficult to see why that rule would not govern the case of an adoption that was made by an unauthorized widow; for the ceremonies in such a case also must be performed in the name of her husband's *gotra*."

[2] See *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363; *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 362, at p. 397.

[3] See *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363, at p. 367; Strange's "Hindu Law," vol. i. pp. 82, 83. In Strange's "Manual," para. 119, a right of maintenance is asserted in every case of an invalid adoption. "Dattaka Chandrika," chap. i. ss. 14, 15; G. C. Sarkar's "Law of Adoption," pp. 420–423.

[4] *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363, followed in *Vaithilingam Mudali* v. *Murugaian* (1912), 37 Mad. 529.

[5] *Lakshmappa* v. *Ramava* (1875), 12 Bom. H. C. 364, at p. 397, followed in *Dalpatsinghji* v. *Raisinghji* (1915), 39 Bom. 528; 17 Bom. L. R. 566.

[6] *Vaithilingam Mudali* v. *Murugaian* (1912), 37 Mad. 529.

[7] *Rajcoomaree Dossee (Sreemutty)* v. *Nobocoomar Mullick* (1856), 1 Boul. 137; Sevestre, 64, note.

[8] Sarkar's "Law of Adoption," p. 421.

receive some compensation for the loss of inheritance in both families. His maintenance is the proper measure of compensation.

But where there is a gift of a boy to a person incompetent to receive, or by a person incompetent to give, the difficulty is the greater. If blame for the invalidity of the adoption can be attached to the adoptive father, as where he has omitted to satisfy himself as to the competency of the donor, or where he has given a power, which is in law invalid, it seems right that his estate should bear the burden of the maintenance. If the reversioner has delayed in challenging the adoption, it may also be equitable to require the estate to bear the burden of maintenance. Where there has been no such delay, and no blame can be attached to the adoptive father, it seems hard upon the reversioner that his interest should be affected by a charge which owes its origin to an unauthorized act. It is impossible to lay down any exact rule for adjusting these equities. The right might properly depend upon the circumstances of each case.

Descendants.

A right of maintenance would apparently not extend to the descendants of the person invalidly adopted.[1] The only texts which provide for the maintenance of persons invalidly adopted, except with regard to those belonging to a class different from that of the adopted father,[2] only contemplate the expenses of the marriage being provided.[3]

Arrangement.

In some cases a boy whose adoption is invalid can take advantage of an arrangement made at the time of his adoption, or thereafter.

In *Rungama* v. *Atchama* [4] the father had divided an ancestral property between a validly adopted son and a son whose adoption was subsequently held to be invalid at the instance of the son who had been validly adopted. The latter was required to compensate the former out of separate property belonging to the father.

In *Surendra Keshav Roy* v. *Doorgasundari Dassee*,[5] an arrangement affecting the rights of two boys who were adopted simultaneously by two widows was enforced against such widows.

Gift to person erroneously described as adopted.

The invalidity of an adoption would not invalidate a gift by will or otherwise to a person erroneously described as an adopted son,[6]

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[1] In *Bawani Sankara Pandit* v. *Ambabay Ammal* (1863), 1 Mad. H. C. 363, at p. 367, the question was suggested, but not decided.

[2] "Dattaka Chandrika," s. 1, paras. 14, 15.

[3] "Dattaka Mimansa," s. 5, paras. 45, 46; "Dattaka Chandrika," s. 2, para. 17; ss. 6, 3.

[4] (1846), 4 M. I. A. 1, at p. 103; 7 W. R. P. C. 57, at p. 62.

[5] (1892), 19 I. A. 108; 19 Calc. 108.

[6] *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry* (1892), 19 I. A. 101; 19 Calc. 452; *Jivani Bhai* v. *Jivu Bhai* (1865), 2 Mad. H. C. 462; *Lali* v. *Murlidhar* (1901), 24 All. 195; S. C. on appeal (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 130; 8 Bom. L. R. 402; *Lalta Prasad* v. *Salig Ram* (1908), 31 All. 5; *Murari Lal* v. *Kundan Lal* (1909), *ibid.* 339. In *Hira Naikin* v. *Radha Naikin* (1912), 37 Bom. 116; 14 Bom. L. R. 1129, a similar rule was applied to the will of a *naikin* (professional prostitute) in favour of her adopted daughter.

unless it appear that the validity of the adoption was a condition of,[1] or the motive for,[2] the gift.

A gift or bequest to a described person with a direction that he should be adopted as a son to the donor or testator takes effect, even in the absence of such adoption,[3] unless it appears that the adoption was a condition of the gift.[4] If it be reasonably clear that the testator would not have made the gift had it not been for the supposed existence of the character of an adopted son, the Court will construe the mention of the character as imposing a condition precedent to the gift.[5]

Where there is a bequest or gift to an unascertained person to be adopted hereafter by the widow of the testator, only a person whose adoption is valid in law can take, even if a valid adoption be inconsistent with the conditions of the gift.[6]

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[1] See cases below, note 4. *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 496; 4 Bom. L. R. 116.

[2] *Fanindra Deb Raikat* v. *Rajeswar Das* (1884), 12 I. A. 72; 11 Calc. 463; *Lali* (*Mussummat*) v. *Murlidhar* (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 130; 8 Bom. L. R. 402; *Vandravan Jekisan* (*Patel*) v. *Manilal Chunilal* (*Patel*) (1890), 15 Bom. 565, at p. 573; *Siddesory Dossee* v. *Doorgachurn Sett* (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 360.

[3] *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1876), 3 I. A. 253; 26 W. R. C. R. 91; *Subbarayer* v. *Subbammal* (1900), 27 I. A. 162; 24 Mad. 214; 4 C. W. N. 304; 2 Bom. L. R. 982. In *Monemothonanth Dey* v. *Onontnanth Dey* (1865), 2 Ind. Jur. N. S. 24, there was an actual adoption of two designated persons in accordance with an invalid power. The gift was upheld.

[4] *Karamsi Madhowji* v. *Karsandas Natha* (1896), 20 Bom. 718; S. C. on appeal (1898), 23 Bom. 271; *Abbu* v. *Kuppammal* (1892), 16 Mad. 355; *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202; *Abhai Charan Ghose* v. *Dasmoni Dasi* (*S. M.*) (1871), 6 B. L. R. 623, differing on the construction of the same will from *Dossmoney Dossee* v. *Prosonomoye Dossee* (1866), 2 Ind. Jur. N. S. 18; *Manjamma* v. *Sheshgirirao* (1902), 26 Bom. 491, at p. 496; 4 Bom. L. R. 116; *Probodh Lal Kundu* v. *Harish Chandra Dey* (1904), 9 C. W. N. 309. See Indian Succession Act (X. of 1865), ss. 113–123, applied to certain Hindu wills by the Hindu Wills Act (XXI. of 1870).

[5] *Siddessory Dossee* v. *Doorgachurn Sett* (1865), 2 Ind. Jur. N. S. 22; Bourke (O. C.), 360.

[6] See *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108; 19 Calc. 513; S. C. in Court below (1886), 12 Calc. 686, where the bequest was to two boys to be simultaneously adopted as sons to the testator.

CHAPTER V.

PARENT AND CHILD (*continued*).

DUTIES AND RIGHTS OF FATHER.

Maintenance.

Maintenance of children.

IT is the duty of a Hindu father to maintain his minor sons [1] and unmarried daughters, provided they are not interested in property sufficient for their support, or are not otherwise capable of maintaining themselves.[2]

It is his duty to provide the marriage expenses of his daughters, and to cause his son to be educated in accordance with his station in life.

There is no obligation to maintain an adult son,[3] except, perhaps, when he is suffering from a disease which prevents him from maintaining himself.[4]

With the exception of a case in Bengal, where it was held that a suit would lie by the mother of an illegitimate child against the putative father for the maintenance of the child,[5] and of a case in Madras where a decree was given at the instance of an illegitimate son,[6] the Reports do not show any successful cases of proceedings in Civil Courts against a father for the maintenance of his child. It may be doubtful whether the

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[1] Whether natural born, or adopted.

[2] "Manu," chap. ix. para. 108; chap. xi. paras. 9, 10; Colebrooke's "Digest," vol. ii. pp. 112, 113; vol. iii. p. 5; Strange's "Hindu Law," vol. i. p. 67.

[3] *Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Premchand Peparah* v. *Hulashchand Peparah* (1869), 4 B. L. R. App. 23; 12 W. R. C. R. 494; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (1877), 2 Bom. 346, at p. 350.

[4] See *Premchand Peparah* v. *Hulashchand Peparah*, 4 B. L. R. App. 23; 12 W. R. C. R. 494.

[5] *Ghana Kanta Mohanta* v. *Gereli* (1904), 32 Calc. 479. In that decision the learned judges relied upon *Run Murdun Syn* (*Chuoturya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132, which was a suit claiming maintenance out of a deceased father's estate. The judges go on to say, "But apart from the Hindu law, we should think that, upon general principles, the defendant, having begotten the child, is bound to provide for its maintenance, if that is necessary." It is submitted that there are no grounds for this general proposition.

[6] *Kuppa* v. *Singaravelu* (1885), 8 Mad. 325.

duty can be enforced in a Civil Court,[1] but it is submitted that if an illegitimate son can enforce such right, legitimate sons are equally entitled.

It is clear that even if there be a right to maintenance, separate maintenance can only be awarded under very special circumstances.[2]

On the death of the father the maintenance of unmarried daughters, and the expenses of their marriage, must be provided out of his property.[3]

Married daughter.

Although on her marriage a daughter ceases to belong to her father's family,[4] and must first look to her husband [5] and his family [6] for her maintenance, there is a moral duty to maintain a married daughter who is without means, and who is unable to obtain support from her husband, or after his death from his family. This duty is not enforceable during the father's lifetime, and it has been held that it is not enforceable against his property after his death.[7]

Persons excluded from inheritance.

Where a son or other heir is excluded from inheritance on account of disability, he is entitled to maintenance for himself and his family out of the property which he would have inherited.[8]

Proceedings in Criminal Court.

A father may be compelled, by proceedings under the Criminal Procedure Code,[9] to maintain his legitimate or illegitimate child, of whatever age he or she may be, who is unable to maintain himself or herself.

As to the rights of children to maintenance out of coparcenary property, see *post*, pp. 234, 235, 271.

Illegitimate sons.

A Hindu is bound to provide for the maintenance of his minor [10] illegitimate sons [11] by Hindu mothers.[12]

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[1] K. K. Bhattacharya ("Law of the Joint Hindu Family," pp. 282, 283) repudiates, however, any distinction between a moral and a legal obligation, except in the Bengal school.

[2] See *Shavatri (Ilata)* v. *Narayanan Nambudiri (Ilata)* (1863), 1 Mad. H. C. 372.

[3] See *Mangal (Bai)* v. *Rukhmini (Bai)* (1898), 23 Bom. 291; *Tulsha* v. *Gopal Rai* (1884), 6 All. 632; Macnaghten's "Hindu Law," vol. ii. chap. ii. case 10; "Vyavastha Darpana," 2nd ed., p. 370.

[4] *Ante*, p. 60.

[5] *Ante*, p. 76.

[6] *Ante*, pp. 78, 79.

[7] *Mangal (Bai)* v. *Rukhmini (Bai)* (1898), 23 Bom. 291. See, however, *Mokhada Dassee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 288; 5 C. W. N. 297, at p. 300. Macnaghten's "Hindu Law," vol. ii. chap. ii. case 10.

[8] "Mitakshara," chap. ii. s. 10, para. 5; "Dayabhaga," chap. v. paras. 11, 14–16; "Smriti Chandrika," chap. v. paras. 10–14, 20.

[9] Act V. of 1898, chap. xxxvi.

[10] *Nilmoney Singh Deo* v. *Baneshur* (1878), 4 Calc. 91.

[11] *Ghana Kanta Mohanta* v. *Gerel* (1904), 32 Calc. 479 (see *ante*, p. 206); *Kuppa* v. *Singaravela* (1885), 8 Mad. 325.

[12] There is no text of Hindu Law under which an illegitimate son of a Hindu by a woman who is not a

After his death his illegitimate sons are entitled to maintenance out of his estate, or out of property in which he was a coparcener,[1] whether impartible or not,[2] if he was a member of one of the regenerate classes.[3] If he was a Sudra they are only so entitled in case they are not entitled to inherit,[4] or to a share on partition.

Under the Bengal school of law, this right against the father ceases on the sons attaining majority,[5] but it is submitted that after the father's death there is a right against his property, even if they are adults.[6] Under the Mitakshara school, they continue entitled to maintenance out of coparcenary property,[7] whether impartible or not, and also out of self-acquired property which was owned by the father; but the right does not descend to their children.[8]

Obedience a condition.

It has been said by the Allahabad High Court in a case [9] governed by the Mitakshara school of law, "Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own

Hindu can claim maintenance, and in none of the reported cases has maintenance ever been awarded to an illegitimate son who was not a Hindu by birth; *Lingappa Goundan* v. *Esudasan* (1903), 27 Mad. 13, at p. 15. See *Addoyto Churn Doss* v. *Woojan Beebee* (1879), 4 C. L. R. 154.

[1] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 353; 2 Bom. L. R. 529.

[2] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. P. C. 15; 11 W. R. P. C. 6; S. C. on remand, *Coomara Yettapa Naikar* v. *Venkateswara Yettia* (1870), 5 Mad. H. C. 405; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 482.

[3] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Parichat* (*Rajah*) v. *Zalim Singh* (1877), 4 I. A. 159; 3 Calc. 214.

[4] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 159; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at p. 43; *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. P. C. 15; 11 W. R. P. C. 6.

[5] *Nilmoney Singh Deo* v. *Baneshur* (1878), 4 Calc. 91.

[6] See "Dayabhaga," chap. ix. para. 28.

[7] *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329; *Pershad Singh* v. *Muhesree* (*Ranee*). (1821), 3 Ben. Sel. R. 132 (new edition, 176); *Rahi* v. *Govinda Valad Teja* (1876), 1 Bom. 97; "Mitakshara," chap. i. s. 12, para. 3; "Dayabhaga," chap. ix. para. 28; "Vyavahara Mayukha," chap. iv. s. 4, para. 30. These texts are founded on a passage of "Vrihaspati," which confines the right to the case where there is no other offspring.

[8] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51; 22 All. 191; 4 C. W. N. 253; 2 Bom. L. R. 529; S. C. in Court below (1896), 8 All. 253.

[9] *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329, at p. 335.

livelihood, is the test by which, under Hindu law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied, but thereafter it cannot be ignored. What constitutes docility or disobedience, in the sense of the texts, is a question the answer of which is not easy; but we think that the true answer is indicated in a *Vaivastha*, translated as No. 2, Book I. chapter vi. section 2, of Messrs. West and Bühler's collection (ed. 1878, p. 276), and we think that, on attaining full age, the respondents must, as a condition of receiving maintenance from the estate of Mauji Lal (the father), render to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong."

"The Court would presume the natural son qualified to receive maintenance, unless the opposite party could show what, in the contemplation of the law, is a legal disqualification." [1]

The right of maintenance is not affected by the child being the result of a casual connection,[2] or by the connection between the parents being adulterous.[3]

The maintenance of an illegitimate son may, like the maintenance of other persons entitled thereto,[4] be secured on the property out of which he is entitled to be maintained.[5]

Amount of maintenance.

In a Madras case [6] it was said, "In determining the rate of maintenance, an illegitimate member of a family, who is not entitled to inherit, can be allowed only a compassionate rate of maintenance, and he cannot claim maintenance on the same principles and on the same scales as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family."

Illegitimate daughter.

The right of an illegitimate daughter to maintenance under the Hindu law has been denied.[7]

Maintenance of widowed daughter-in-law.

A Hindu is morally, although not legally, bound to maintain the widow of his son, even "if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son, and has not had his rights in any property enlarged by his son's death." [8]

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[1] Strange's "Hindu Law," vol. ii. p. 71.

[2] See *Muttusamy Jagavira Yettapa Naikar* v. *Venkatasubha Yettia* (1865), 2 Mad. H. C. 293; S. C. on appeal (1868), 12 M. I. A. 203 (see p. 220); 2 B. L. R. P. C. 15 (see p. 20); 11 W. R. P. C. 6 (see p. 9).

[3] *Viraramuthi Udayan* v. *Singaravelu* (1877), 1 Mad. 306; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Subramania Mudali* v. *Valu* (1910), 34 Mad. 68.

[4] *Ante*, p. 89.

[5] *Ananthaya* v. *Vishnu* (1893), 17 Mad. 160.

[6] *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32, at pp. 36, 37.

[7] *Parvati* v. *Ganpatrao Balal* (1893), 18 Bom. 177, at p. 183. It was not necessary to decide the point in that case.

[8] *Meenakshi Ammal* v. *Rama Aiyar* (1912), 37 Mad. 396; *Janki* v. *Nand Ram* (1888), 11 All. 194, at pp.

Where her husband had been a coparcener, she is entitled to be maintained out of the coparcenary property [1] although she may have lived apart from him.[2]

The fact that the father-in-law had sold coparcenary property to pay his debts does not render him liable for his daughter-in-law's maintenance.[3]

After his death, the persons who inherit his property, or whose interest in property is enlarged by his death, are legally bound to maintain his daughter-in-law, if chaste,[4] out of the property which they have so inherited, or in which their interest has been enlarged, whether the property be coparcenary or self-acquired.[5]

There is a difference of opinion as to whether this right is independent of any provisions made in the will of the father-in-law.[6]

198–200; *Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Ganga Bai* v. *Sitaram* (1876), 1 All. 170; *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15; S. C. *Kasheenath Das* v. *Khettur Monee Dossee*, 9 W. R. C. R. 413, differing from *Koodee Monee Debea* v. *Tarrachand Chuckerbutty* (1865), 2 W. R. C. R. 134; S. C. on appeal *Khettur Monee Dossee* v. *Kasheenath Doss* (1868), 10 W. R. F. B. 89; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103; *Yamunabai* v. *Manubai* (1899), 23 Bom. 608, at p. 609; 1 Bom. L. R. 95; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199, at p. 207; *Hema Kooeree* (*Mussamut*) v. *Ajoodhya Persad* (1875), 24 W. R. C. R. 474. In *Chandrabhagabai* v. *Kashinath* (1866), 2 Bom. H. C. 323, the father-in-law was held liable for his daughter-in-law's maintenance, but that decision was differed from in *Savitribai* v. *Luximibai* (1878), 2 Bom. 573, at pp. 583, 584. See *Debur Ramnath Roy Chowdhry* v. *Arnee Kally Debia* (*Sreemutty*) W. R. 1864, C. R. 177.

[1] *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 521, see *post*, pp. 234, 235, 271.

[2] *Surampalli Bangaranma* v. *Surampalli Brambaze* (1908), 31 Mad. 338.

[3] *Ganga Bai* v. *Sitaram* (1876), 1 All. 170, at p. 177.

[4] *Koodee Monee Dabee* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134.

[5] *Siddessury Dassee* v. *Janardan Sarkar* (1902), 29 Calc. 557; 6 C. W. N. 530; *Janki* v. *Nandram* (1888), 11 All. 194; *Kamini Dassee* v. *Chandra Pole Mundle* (1889), 17 Calc. 373; *Yamunabai* v. *Manubai* (1899), 23 Bom. 608; 1 Bom. L. R. 95; *Koodee Monee Dabee* v. *Tarra Chand Chuckerbutty* (1865), 2 W. R. C. R. 134. See *Rangammal* v. *Echammal* (1898), 22 Mad. 305, at p. 307; *Devi Persad* v. *Gunwanti Koer* (1895), 22 Calc. 410, at p. 417; *Adhibai* v. *Cursandas Nathu* (1886), 11 Bom. 199; *Surampalli Bangaramma* v. *Surampalli Brambaze* (1908), 31 Mad. 338; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103, at pp. 104, 105; Jolly's "History of the Hindu Law," pp. 134, 135; West and Bühler, 3rd ed., pp. 245–252. *Contrà Ammakannu* v. *Appu* (1887), 11 Mad. 91; *Komulmuni Dasee* v. *Bodhnarain Mujmooadar* (1823), 2 Macn. H. L. 119; "Smriti Chandrika" (Krishnasawmi Iyer's translation), chap. xi. s. 1, para. 34; Mitakshara on Subtraction of Gift, cited Strange's "Manual," para. 209.

[6] *Parvati* (*Bai*) v. *Tarwadi Dolatram* (1900), 25 Bom. 263; 2 Bom. L. R. 894. *Rangammal* v. *Echammal* (1898), 22 Mad. 305, at p. 307, denies the right of the daughter-in-law. Such right is asserted by *In the goods of Gobinda Chandra Babajee* (1913), 17 C. W. N. 1141.

It is submitted that the father-in-law can deal with his separate property by will independently of any claim by his daughter-in-law.

The daughter-in-law does not lose her right by declining to reside in her father-in-law's house.[1]

Son-in-law.

In a Bengal case [2] maintenance was allotted by an implied contract to a son-in-law, who had lived in his father-in-law's house.

Impartible property.

Where the property of the father is impartible, and subject to the law of primogeniture, sons, even if adult, and capable of earning subsistence, are entitled to maintenance where the Mitakshara school of law applies.[3] They are also so entitled after his death, as against their brother or the person in possession,[4] whether, it is submitted, they are governed by the Bengal or the Mitakshara school. Their descendants have no such right.[5]

Grand-children.

Grandsons have not, as such, any right to be maintained by their grandfather,[6] but apparently they have a right to be maintained out of his property if unable to maintain themselves, and granddaughters must be so maintained until marriage.[7]

The marriage expenses of a granddaughter have been held to be properly payable out of her deceased grandfather's estate.[8]

Maintenance of parents.

A Hindu is bound to support his father and mother if they are in want. After his death his property is liable for their maintenance.[9]

In a case where the father had murdered his own father and was

[1] *Siddessury Dassee* v. *Janardan Sarkar* (1903), 29 Calc. 557; 6 C. W. N. 530. See *ante*, p. 81.

[2] *Govind Rani Dasi* v. *Radha Ballabh Das* (1910), 15 C. W. N. 205.

[3] *Hinmatsing Becharsing* v. *Ganpatsing* (1875), 12 Bom. H. C. 94; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (1877), 2 Bom. 346.

[4] *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prasada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74; 2 Bom. L. R. 945. As to maintenance from *saranjams*, see *Madhavrav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519.

[5] See *Nilmony Sing Deo* v. *Hingoo Lall Singh Deo* (1879), 5 Calc. 256. As to a grant in lieu of maintenance see *Raja Jee Bahadur Garu* (*Raja*) v. *Parthasaradhi Appa Row* (1902), 30 I. A. 14; 26 Mad. 202; 8 C. W. N. 105.

[6] *Kalu* v. *Kashibai* (1882), 7 Bom. 127; *Manmahini Dasi* v. *Balak Chandra Pandit* (1871), 8 B. L. R. 22; 15 W. R. C. R. 498.

[7] See *Chumun Lall* v. *Gunput Lall* (*Lalla*) (1871), 16 W. R. C. R. 52.

[8] *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429.

[9] *Subbarayana* v. *Subbakka* (1884), 8 Mad. 236; Strange's "Manual," para. 209; Macnaghten's "Hindu Law," vol. ii. pp. 113–115; Sircar's "Vyavastha Darpana," 2nd ed., p. 375; "Manu," chap. viii. para. 389; Strange's "Hindu Law," vol. ii. pp. 83, 90.

therefore excluded from inheritance,[1] his son was held to be liable for his maintenance.[2]

A stepson is not obliged to maintain his stepmother out of his self-acquired property,[3] but he must maintain her out of family property.

A grandmother and sister (until marriage, and after marriage if destitute [4]) are also to be maintained out of the property of a Hindu after his death.[5]

A mother does not apparently lose her right to maintenance by unchastity,[6] except in Bengal.[7]

It is also the right and duty of a Hindu to perform the funeral ceremonies and other ceremonies in commemoration of his father and mother,[8] grandparents, and great-grandparents.[9]

Duty of heir.

An heir is legally bound to provide out of the estate which descends to him maintenance for such persons as the person from whom he inherits was legally or morally bound to support.[10]

"The obligation of an heir to provide out of the estate, which descends to him, maintenance for certain persons whom the ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance." [11]

There is a difficulty in determining whether the person claiming maintenance is one whom the late proprietor was morally bound to maintain.[12] The texts lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain,

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[1] *Post*, p. 373.

[2] *Nilmadhab Mitter* v. *Jotindra Nath Mitter* (1913), 17 C. W. N. 341.

[3] *Daya (Bai)* v. *Natha Govindlal* (1885), 9 Bom. 279.

[4] Strange's "Hindu Law," vol. ii. p. 83. See, however, *Mangal (Bai)* v. *Rukhmini (Bai)* (1898), 23 Bom. 291.

[5] Sircar's "Vyavastha Darpana," 2nd ed., p. 370.

[6] See *Valu* v. *Ganga* (1882), 7 Bom. 84, at p. 90.

[7] Sircar's "Vyavastha Darpana," 2nd ed., p. 371, note.

[8] *Sundarji Damji* v. *Dahibai* (1904), 29 Bom. 316; 6 Bom. L. R. 1052; *Vrijbhukandas* v. *Parvati (Bai)* (1907), 32 Bom. 26; 9 Bom. L. R. 1187.

[9] *Sundarji Damji* v. *Dahibai* (1904), 29 Bom. 316; 6 Bom. L. R. 1052.

[10] *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15, at p. 34; 9 W. R. C. R. 413, at p. 422. See *Mokhada Dassee* v. *Nundo Lall Haldar* (1901), 28 Calc. 278, at p. 288; 5 C. W. N. 297, at p. 300. *Janki* v. *Nand Ram* (1888), 11 All. 194, at p. 201; *Rujjomoney Dossee* v. *Shibchunder Mullick* (1864), 2 Hyde, 103. This applies to Khojas, *Rashid Karmali* v. *Sherbanoo* (1904), 29 Bom. 85.

[11] *Khetramani Dasi* v. *Kashinath Das* (1868), 2 B. L. R. A. C. 15, at p. 38; 9 W. R. C. R. 413, at p. 422. See *Tarunginee Dossee* v. *Chowdhry Dwarkanath Mussant* (1873), 20 W. R. C. R. 196.

[12] *Kamini Dassee* v. *Chandra Pole Mundle* (1889), 17 Calc. 373, at p. 377. See Sircar's "Vyavastha Darpana," 2nd ed., p. 370; G. C. Sarkar's "Hindu Law," p. 238.

including the persons disqualified from inheritance and those dependent on them.[1]

As to when maintenance is a complete charge upon property, see the cases relating to the maintenance of a widow, *ante*, pp. 89–93.

As to the fixing of the amount of maintenance, see *ante*, pp. 86, 87.

Guardianship.

Right of guardianship.

A Hindu father is recognized as the legal guardian of all his male, and of his female unmarried, minor legitimate children,[2] and is as such entitled to the custody of their persons and property.

The adoptive father acquires the same right, even as against the natural father.[3]

Testamentary guardian.

An adult [4] Hindu father can, by word or writing, nominate a guardian for his children after his death, and he is unrestricted in the choice of such guardian. He may exclude even the mother from the guardianship.[5]

He cannot during his lifetime substitute another person to be guardian in his place.[6]

Although the right of the father to the guardianship of his children

[1] *Lakshman Ramchandra* v. *Sarasvatibai* (1875), 12 Bom. H. C. 69, at p. 77; "Vyavahara Mayukha," chap. iv. s. 4, para. 30; s. 9, para. 22; s. 11, paras. 1, 3, 9, 12; "Mitakshara," chap. ii. s. 1, paras. 7, 12, 13, 20, 21; s. 10, paras. 5, 15. The Rishi texts on the subject are collected in R. C. Mitra's "Law of Joint Property," pp. 66–68.

[2] *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881, at p. 884; 2 C. W. N. 379, at p. 381; *In the matter of Prankrishna Surma* (1882), 8 Calc. 969; S. C. *Parameshwari Surma* v. *Empress*, 11 C. L. R. 6; Macnaghten's "Hindu Law," vol. i. ed. 1829, chap. vii. p. 103; *In the matter of Himnauth Bose* (1862), 1 Hyde, 111. See Act VIII. of 1890, s. 19.

[3] *Sree Narain Mitter* v. *Kishensoondery Dassee* (*Sreemutty*) (1893), I. A. Sup. Vol. 149, at p. 163; 11 B. L. R. 171, at p. 191; S. C. *Nogendro Chundro Mittro* v. *Kishensoondery Dossee* (*Sreemutty*), 19 W. R. C. R. 133, at p. 139; *Laksmibhai* v. *Shridar Vasudev Takle* (1878), 3 Bom. 1.

[4] By not incorporating s. 47 of the Indian Succession Act (X. of 1865) in the Hindu Wills Act (XXI. of 1870), the Legislature has apparently indicated its opinion that the privilege enjoyed by adult Hindu fathers should not be extended to fathers who are themselves minors.

[5] *Pirthee Lal Jha* (*Soobah*) v. *Doorga Lal Jha* (*Soobah*) (1867), 7 W. R. C. R. 73, at p. 75. See Act VIII. of 1890, s. 6; *Budhilal Manji* v. *Murarji Premji* (1907), 31 Bom. 413; 9 Bom. L. R. 553; *Mahableshwar* v. *Ramchandra* (1913), 15 Bom. L. R. 882.

[6] *Besant* v. *Narayaniah* (1914), 41 I. A. 314; 38 Mad. 807; 18 C. W. N. 1089; 16 Bom. L. R. 625.

has been recognized by the legislature, it is one which is given to him for the benefit of his children, and should he at any time show himself unfit to be guardian the Court will place the custody of his children in a more suitable person.[1]

Ample provision is made in the Guardians and Wards Act, 1890, for the purpose of protecting the persons and property of infants, and although the Court will have regard to the principle that it is generally for the benefit of infants that they should remain in the custody of their parents, and will also have regard to the personal law of the infant in question, the Courts will, in appointing a guardian, consider only the physical, moral, and religious welfare of the infant.[2]

Right of mother.

On the death of the father, or in his absence,[3] or in case of his having lost the right of guardianship, and in the absence of a valid appointment by him, the mother is entitled to the guardianship of her minor children.[4]

It has been held that under the Mithila law, the mother is entitled to the guardianship even during the lifetime of the father.[5]

Illegitimate children.

A mother would ordinarily be entitled to the guardianship of her illegitimate child, and the father would against the mother have no right of guardianship.[6]

Appointment of guardian by Court.

A parent is liable to be superseded by the appointment of a guardian under the provisions of the Guardians and Wards Act, 1890, but the Court cannot make such appointment when the father is alive, unless he is unfit to be guardian.[7]

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[1] See Act VIII. of 1890, s. 19.

[2] See Act VIII. of 1890, s. 17; *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881; 2 C. W. N. 379; *Bhikuo Koer (Musst.)* v. *Chamela Koer (Musst.)* (1897), 2 C. W. N. 191; *Pollard* v. *Rouse* (1910), 33 Mad. 288; *Tota Ram* v. *Ram Charan* (1910), 33 All. 222; *Re Gulbai* (1907), 32 Bom. 50.

[3] See *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194.

[4] *Pirthee Lal Jha (Soobah)* v. *Doorga Lal Jha (Soobah)* (1867), 7 W. R. C. R. 73, at p. 75; *Ram Dhun Doss* v. *Ram Ruttun Dutt* (1868), 10 W. R. C. R. 425, at p. 426; *S. Namasevayam Pillay* v. *Annamai Ummal* (1869), 4 Mad. H. C. 339, at p. 343; *Kooldeep Narain* v. *Rajbunsee Kowur* (1847), 7 Ben. Sel. R. 395 (2nd edition, p. 467); *Kaulesra* v. *Jora Kasaundan* (1905), 28 All. 233; Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 103; and vol. ii. chap. vii. case iv. p. 205.

[5] *Jussoda Kooer* v. *Nettya Lall (Lallah)* (1879), 5 Calc. 43. There does not seem to be any other authority to the same effect. In *Pirthee Lal Jha (Soobah)* v. *Doorga Lal Jha (Soobah)* (1867), 7 W. R. C. R. 74, where the parties were governed by the Mithila school, a testamentary guardian, who was appointed by the father, was preferred to the mother.

[6] *In the matter of Saithri* (1891), 16 Bom. 307, at p. 317; *Venkamma* v. *Savitramma* (1888), 12 Mad. 67, at p. 68; *King* v. *Nagapen* (1814), 2 Mad. N. C. 91.

[7] Act VIII. of 1890, s. 19.

Failing the father and mother, the Hindu law prescribed a succession to the right of guardianship. The elder brother, the elder half-brother, the paternal relations, and failing them the maternal kinsmen were preferred in order of priority;[1] but their right was not, as in the case of the father or mother, an absolute one.[2] In appointing a guardian a Court will be guided to some extent by this order of succession,[3] but it would not give the same effect to the claims of these relatives as it would to the claim of a father or mother.

Other relations.

As to the guardianship of a female minor after marriage, see *ante*, p. 66.

If the minor is a member of a joint Hindu family, the manager of the family is entitled to the management of the joint property;[4] but if the family be a divided one, the mother is, failing the father, entitled to the custody of the minor's property;[5] and even if the family be joint, she would apparently be so entitled, so far as the minor's separate property, if any, is concerned. Where the mother is manager of her minor child's property, her position necessarily requires her to seek the advice of her husband's relations,[6] and she would often strengthen her position by so doing, but the law cannot compel her to seek, or to act under, their advice, if she wishes to take the whole responsibility upon herself.

Guardianship of property.

A father may lose his right to the guardianship of his children by a persistent course of ill-treatment, by conduct tending to their corruption, or by acting in a way injurious to their morals or interest.[7] He may lose the right by waiver, as where he has permitted another person to maintain and educate them, and it would be detrimental to their interests to alter the mode of their maintenance in course of their education,[8] but except in

Loss of right.

[1] Macnaghten's "Hindu Law," vol. i. pp. 103, 104; Strange's "Hindu Law," vol. i. p. 71.

[2] *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (1878), 2 C. L. R. 583. See *Bhikuo Koer (Musst.)* v. *Chamela Koer (Musst.)* (1897), 2 C. W. N. 191; *Thayammal* v. *Kuppanna Koundan* (1914), 38 Mad. 1125.

[3] See Strange's "Hindu Law," vol. i. p. 71; Act VIII. of 1890, s. 17 *Lachmi Narain* v *Balaram Sabai* (1917), 2 Pat. L. J. 190.

[4] *Post*, pp. 270, 271.

[5] Sir E. H. East's Notes, Morley's "Digest," vol. ii. p. 50; West and Bühler, 2nd ed., p. 88. In *Motee Singh* v. *Dooluth Singh*, N.-W. P. S. D. A., 13th April, 1844, it was held that an elder brother, if not separated, could act as guardian.

[6] Macnaghten's "Hindu Law," ed. 1829, vol. i. chap. vii. p. 103; and see Sir E. H. East's Notes, Morley's "Digest," vol. ii. p. 50.

[7] See Act VIII. of 1890, s. 19 (*b*).

[8] *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (1898), 25 Calc. 881; 2 C. W. N. 379; *In the matter of Joshi Assam* (1895), 23 Calc. 290. See *Modhoosoodun Mookerjee* v. *Jadub Chunder Banerjee* (1865), 3 W. R. C. R. 194.

that event he can revoke any arrangement which he has made as to their custody or education.[1]

A mother may also for similar reasons lose her right.[2]

Change of religion.

It is submitted that a father or mother does not lose his or her right by a change of religion.[3]

Loss of caste.

Under the Hindu law loss of caste apparently involved a loss of the right of guardianship of the person and property of minors; [4] but since the passing of Act XXI. of 1850, such right of guardianship ceased to be affected by loss of caste.[5] Where, however, the appointment of a guardian is made by a Court, the fact that the person proposed is out of caste would be a matter for consideration.[6]

Recluse.

Under the Hindu law a father or other guardian might lose his right by permanently emigrating, becoming a recluse or entering a religious order.[7]

Hindu widows.

Hindu widows do not on remarriage *ipso facto* lose their right of guardianship of their children,[8] but, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the husband the guardian of his children, the father, or paternal grandfather, or the mother or paternal grandmother, or any male relative, of the husband can apply to the highest Court having original jurisdiction in civil cases in the place where the husband was domiciled at

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[1] *Besant* v. *Narayaniah* (1914), 41 I. A. 314; 38 Mad. 807; 18 C. W. N. 1089; 16 Bom. L. R. 625.

[2] *Venkamma* v. *Savitramma* (1888), 12 Mad. 67; *In the matter of Saithri* (1891), 16 Bom. 307.

[3] Act XXI. of 1850; *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235; *Queen* v. *Bezonji*, Perry's Oriental Cases, p. 91. It has been doubted whether Act XXI. of 1850 affects guardianship, but the Punjab Chief Court (*In the matter of Gul Mahomed*) has held that a right of guardianship is a right within the meaning of Act XXI. of 1850. See *Kanahi Ram* v. *Biddya Ram* (1878), 1 All. 549; *Kaulesra* v. *Jorai Kasaundan* (1905), 28 All. 233; *Shamsing* v. *Santabai* (1901), 25 Bom. 551, at p. 555; 3 Bom. L. R. 89; *Putlabai* v. *Mahadu* (1908), 33 Bom. 107; 10 Bom. L. R. 1134.

[4] See Strange's "Hindu Law," vol. i. p. 160.

[5] *Muchoo* v. *Arzoon Sahoo* (1866), 5 W. R. C. R. 235, above, note 3; *Kanahi Ram* v. *Biddya Ram* (1878), 1 All. 549; *Kaulesra* v. *Jorai Kasaundhan* (1905), 28 All. 233.

[6] *Fuggoo Daye* v. *Ranah Daye* (1865), 4 W. R. M. A. 3.

[7] See *In the matter of Ishwar Chunder Surma*, Ben. S. D. A. 1850, p. 471. Strange's "Hindu Law," vol. i. p. 185; Sutherland's "Synopsis of the Law of Adoption," 2nd head.

[8] *Ganga Pershad Sahu* v. *Jhalo* (1911), 38 Calc. 862; 15 C. W. N. 579. Act XV. of 1856, s. 5. This Act has been declared to be in force throughout British India, except as regards the Scheduled Districts (Act XV. of 1874, s. 3), and in the Santhal Pergunnahs (Reg. III. of 1872, s. 3, as amended by Reg. III. of 1886). As to the Scheduled Districts to which it has been applied, see General Acts, 1854–66, 4th ed., p. 121.

the time of his death for the appointment of a guardian,[1] and the Court may, if it should think fit, appoint such guardian who, when appointed, shall be entitled to have the care and custody of such children during their minority in the place of their mother, and in making such appointment the Court must be guided, as far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother.[2]

When the children have not property of their own sufficient for their support and proper education whilst minors, the appointment can only be made with the consent of the mother, unless the proposed guardian gives security for the support and proper education of the children whilst minors.[3]

Remedies. A father or other person entitled to the custody of an infant can recover such custody by suit.[4]

When the child is within the limits of the ordinary original civil jurisdiction of the High Courts of Bengal, Madras, and Bombay, he can apply for relief under sec. 491 of the Code of Criminal Procedure.[5]

Sec. 25 of the Guardians and Wards Act, 1890,[6] gives the District Courts power to arrest a ward and deliver him into the custody of his guardian.

Where the child is confined under such circumstances that the confinement amounts to an offence, sec. 100 of the Criminal Procedure Code [7] is applicable, and sec. 552 of the same code deals with the case of a female child under fourteen years of age, who has been detained for an unlawful purpose.

The powers of a guardian (*de facto* or *de jure*) to alienate the property of his ward are the same as those of a manager of a joint family acting for a minor coparcener, see *post*, pp. 285 *et seq.*

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1 Act XV. of 1856, s. 3. The application may be made under that Act, or under the Guardians and Wards Act (VIII. of 1890). In the latter case the conditions necessary for an application under Act VIII. of 1890 would apply. Act XV. of 1856 has in this matter no application to women who, by the rules of their caste, are capable of contracting a second valid marriage. In *Kishen* v. *Enayet Hossain*, S. D. A. N.-W. P., 25th June, 1861, it was held that a woman of the Aheer caste does not by remarriage forfeit her rights to act as guardian of her son by her first marriage.

2 Act XV. of 1856, s. 3. See *Khushali* v. *Rani*, 4 All. 195.

3 Act XV. of 1856, s. 3.

4 *Sharifa* v. *Munekhan* (1901), 25 Bom. 574; 2 Bom. L. R. 617; *Balmakund* v. *Janki* (1881), 3 All. 403; *Achrathal Jekisandas* v. *Chimanlal Parbhudas* (1916), 40 Bom. 600; 18 Bom. L. R. 582. See, however, *Sham Lal* v. *Bindo* (1904), 26 All. 594. The guardian would bring the suit in his own name. For recent examples of suits of this kind, see *Krishna* v. *Reade* (1885), 9 Mad. 31; S. C. *Reade* v. *Krishna* (1886), 9 Mad. 391; *Venkamma* v. *Savitramma* (1888), 12 Mad. 67; *Abasi* v. *Dunne* (1878), 1 All. 598.

5 Act V. of 1898.

6 Act VIII. of 1890.

7 Act V. of 1898.

CHAPTER VI.

THE JOINT FAMILY AND ITS PROPERTY.

Of what the family consists.

AMONG Hindus a family is not ordinarily composed only of parents and their unmarried children, although that type of family is sometimes to be found. The family would generally be composed of a man, his wife, or wives, his unmarried children, his married sons and their wives and children, and, in cases where they are not maintained by their husband's family, his widowed daughters.[1]

A family of this type, although in many respects complete in itself, may be a component part of a larger family. This larger family consists of all the descendants in the male line from a common ancestor, and their wives, sons, and unmarried daughters.[2]

Whether the family be of the larger or smaller type, the members would ordinarily live together, being maintained from the common purse, and performing jointly the ceremonies required by their religion.

A family so living together is called by English lawyers a joint Hindu family, and in its ordinary condition the members of it are said to be joint in food, worship, and estate.

> "The fundamental principle of the Hindu joint family is the tie of sapindaship.[3] Without that it is impossible to form a joint family." [4]

Rights of members.

The rights of the individual members in the property belonging to the family vary, in accordance with the school of law to which the family belongs.[5]

If the family be governed by the Bengal school of law, sons

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[1] See *ante*, p. 207, and *post*, pp. 234, 235.

[2] See Intro. to "Study of Hinduism," by Guru Prosad Sen, pp. 87–90.

[3] See *post*, p. 379.

[4] *Karsondas Dharamsey* v. *Gangabai* (1908), 32 Bom. 479, at p. 493; 10 Bom. L. R. 184. K. K. Bhattacharya's "Law Relating to the Joint Hindu Family," pp. 38, 39, 137.

[5] See *ante*, p. 20.

partition, the separating or dividing members form new families, to which the joint family system applies.[1]

The joint family may also come to an end by the death of the last surviving coparcener, in which case, in default of his disposing of the property, his heir takes by inheritance.

"By the nature of the case the joint family must commence, and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family."[2]

The joint family system undoubtedly owes its origin to the patriarchal system. As time advanced the exclusive rights of the father became modified in favour of the sons, who asserted rights to an interest in the property, but continued to live together with unity of possession of the family property.

As to the origin of the joint family system, and as to the similarities between it and other ancient systems of law, see Sir Henry Maine's "Ancient Law," pp. 123–161; Mayne's "Hindu Law," 8th ed., chap. vii.; Krishna Kamal Bhattacharya's "Law Relating to the Joint Hindu Family," Lectures I. and II.; Jogendranath Bhattacharya's "Commentaries on the Hindu Law," 2nd ed., pp. 216–218.

Burden of proof as to family or property being joint.

In a suit which involves a question as to whether a family was joint or separate, or whether a particular property belonged to a joint family, or was the separate acquisition of an individual member of the family,[3] the burden of proof would depend upon the allegations in the pleadings or at the hearing, and would, as in other cases, lie on the person who would fail if no evidence at all were given on either side.[4]

This burden of proof would be shifted by the following presumptions:—

Presumption of union.

Every Hindu family is presumed to be joint in food, worship, and estate. The property belonging to the family is presumed to be joint and undivided, the burden of proving a separation being upon the person alleging it.[5]

As to the presumption with regard to property in the name of a coparcener, see *post*, pp. 254.

[1] *Bata Krishna Naik* v. *Chintamani Naik* (1885), 12 Calc. 262.

[2] *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397; at p. 404; 20 W. R. C. R. 189, at p. 192. See *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70; *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, at p. 36. See *post*, pp. 241, 242.

[3] See *post*, pp. 248–254.

[4] Indian Evidence Act (I. of 1872), s. 102. See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

[5] *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1861),

This presumption is merely a presumption as to the continuance of a juridical relationship,[1] combined with a presumption as to the ordinary practice of Hindu families.[2] It applies as much to the case of a father and son, governed by the Mitakshara law, as to the case of brothers and other coparceners.[3] It takes the place of evidence, and may be displaced by evidence of a state of things inconsistent with such presumption.[4]

Separation in dwelling and food.

It is not necessary, for the preservation of the joint nature of family property, that the members of the family should live in commensality; they may dwell and mess apart, and yet remain joint in property.[5]

Separate dealings.

The presumption that the family is joint would be weakened, if not rebutted, by evidence of separate trading funds, and property, and independent dealing with such property,[6] although the family may have been joint in food.[7]

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9 M. I. A. 66, at p. 92; 1 W. R. P. C. 30, at p. 32; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1869), 12 M. I. A. 523, at p. 540; 3 B. L. R. P. C. 13, at p. 17; 12 W. R. P. C. 21, at p. 23; *Cheetha (Mussamut)* v. *Miheen Lall (Baboo)* (1867), 11 M. I. A. 369; *Prit Koer* v. *Mahadeo Pershad Singh* (1894), 21 I. A. 134, at p. 135; 22 Calc. 85, at p. 89; *Bhugobutty Misrain* v. *Domun Misser* (1875), 24 W. R. C. R. 365; *Taruck Chunder Poddar* v. *Jodeshur Chunder Koondoo* (1873), 11 B. L. R. 193; 19 W. R. C. R. 178; *Shib Pershad Chuckerbutty* v. *Gunga Monee Debee* (1871), 16 W. R. C. R. 291; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280, at p. 309; *Bilash Koonwar (Mussamut)* v. *Bhawanee Buksh Narain (Baboo)*, W. R. 1864, C. R. 1; *Bissumbhur Sircar* v. *Soorodhuny Dossee* (1865), 3 W. R. C. R. 21; *Treelochun Roy* v. *Rajkishen Roy* (1866), 5 W. R. C. R. 214; *Beer Narain Sircar* v. *Teen Cowree Nundee* (1864), 1 W. R. C. R. 316.

[1] Cf. Indian Evidence Act (I. of 1872), ss. 109, 114, illustration (*d*).

[2] Indian Evidence Act (I. of 1872), s. 114.

[3] *Kallianji* v. *Bezonji* (1908), 32 Bom. 512; 10 Bom. L. R. 754.

[4] See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

[5] *Ganesh Dutt Thakoor (Chowdhry)* v. *Jewach Thakoorain (Mussummat)* (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; 6 Bom. L. R. 1; *Rewun Persad* v. *Radha Beeby (Mussumat)* (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Nursingh Das (Rai)* v. *Narain Das (Rai)* (1871), 3 N. W. P. 217, at p. 235; *Banee Madhub Mookerjee* v. *Bhuggobutty Churn Banerjee* (1867), 8 W. R. C. R. 270; *Hurish Chunder Mookerjee* v. *Mokhoda Debia* (1872), 17 W. R. C. R. 564; *Sherajooddeen Ahmed (Shaikh)* v. *Horel Singh* (1876), 25 W. R. C. R. 116; *Parbutty Coomar* v. *Sudabut Persad* (1865), 2 Hay, 315; *Gour Lall Singh* v. *Mohesh Narain Ghose* (1870), 14 W. R. C. R. 484; *Pearee Monee Bibee* v. *Madhub Singh* (1871), 15 W. R. C. R. 93; *Belas Koer (Mussamut)* v. *Bhowanee Buksh (Baboo)* (1863), Marsh, 641; S. C. on review, W. R. 1864, C. R. 1; *Vurdyengar* v. *Alagasingyengar* (1807), Strange's "Hindu Law," vol. ii. p. 371.

[6] *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317; 19 W. R. C. R. 356. See *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar* (1890), 15 Bom. 201; *Makhun Lall Dutt* v. *Ram Lall Shaw* (1898), 3 C. W. N. 134; *Peary Lall* v. *Bhawoot Koer* (1862), W. R. Sp. No. 18; *Udoy Chand Biswas* v. *Panchoo Ram Biswas* (1882), 11 C. L. R. 514.

[7] See *Bodh Sing Doodhooria* v.

Some holdings in severalty.

The circumstance that certain parcels are held in severalty does not rebut the presumption as regards the rest of the joint estate.[1]

Disruption of unity.

Where it is admitted or proved that a disruption of the unity of the joint family has taken place, this presumption has no application.[2]

When one coparcener separates from the others there is no presumption that the remaining members continue united. In that case an agreement to remain united or to reunite must be proved like any other fact: [3] but where a share is allotted to more than one person the presumption will be that such persons remain joint.[4]

No presumption as to time of separation.

When it is admitted or proved that the members of the family were not in a complete state of union at the time of the institution of the suit, there is no presumption as to the family being joint at a particular time,[5] or as to when the separation took place, but it lies upon the plaintiff to prove such a case as would entitle him to the relief which he seeks.[6]

When partial partition is admitted or proved the presumption is that there has been an entire partition both with reference to interest and properties.[7]

There is authority under the Bengal school of law that when one coparcener separates from the others who remain joint, such others are to be treated as reunited,[8] but it is submitted that such separation in no way affects the status *inter se* of the coparceners who remain joint.[9]

Ganesh Chunder Sen (1878), 12 B. L. R. 317, at p. 326; 19 W. R. C. R. 356, at p. 357; *Gajindar Narain (Rai)* v. *Harihar Narain (Rai)* (1908), 12 C. W. N. 687.

[1] *Sreeram Ghose* v. *Sreenath Dutt Chowdhry* (1867), 7 W. R. C. R. 451.

[2] *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R. 428; *Bannoo* v. *Kashee Ram* (1877), 3 Calc. 315; *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1908), 32 Mad. 191; *Badul Singh* v. *Chutterdharee Singh* (1868), 9 W. R. C. R. 558; *Somangowda* v. *Bharmungowda* (1863), 1 Bom. H. C. 43.

[3] *Balabux Ladhuram* v. *Rukhmabai* (1903), 30 I. A. 130; 30 Calc. 725; 7 C. W. N. 642; 5 Bom. L. R. 469; *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R. 428; *Kulada Proshad Panday* v. *Haripoda Chatterjee* (1912), 40 Calc. 407; 17 C. W. N. 102 (a case where one of the family had become a Christian); *Babaji Akoba* v. *Dattu Laxman* (1912), 37 Bom. 64; 14 Bom. L. R. 923. See, however, *Upendranarain Myti* v. *Gopeenath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356. It was held in *Ranganatha Rao* v. *Narayanasami Naicker* (1900), 31 Mad. 482, that there is no presumption of a general division among all the members of a coparcenary from the fact that one of its members has separated.

[4] See *Durga Dei* v. *Balmakund* (1906), 29 All. 93.

[5] *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237, at p. 243.

[6] *Ram Ghulam Singh* v. *Ram Behari Singh* (1895), 18 All. 90.

[7] *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (1908), 32 Mad. 191, at p. 195; *Anandibai* v. *Harisuba Pai* (1911), 35 Bom. 293; 13 Bom. L. R. 287, see *post*, pp. 340, 343, 344.

[8] *Jaudub Chunder Ghose* v. *Benodbeharry Ghose* (1862), 1 Hyde, 214; *Petambur Dutt* v. *Hurish Chunder Dutt* (1871), 15 W. R. C. R. 200. See *Kesabram Mahapattar* v. *Nandkishor Mahapattar* (1869), 3 B. L. R. A. C. 7. As to reunion, see *post*, pp. 359, 360.

[9] See *Upendranarain Myti* v. *Gopeenath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 156, 157. *Post*, p. 344.

"The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family, the presumption becomes weaker and weaker."[1] Strength of presumption.

In practice a family does not continue joint for many generations. It has been said[2] that "in no case . . . will it be found that the diluted degree of blood relationship amongst the members of the complex family group extends beyond the fourth degree." Another writer says, "I doubt whether at this day there is a single undivided Hindu family throughout India, in which persons related to one another by a common ancestor beyond the seventh degree are to be found living together, or holding property in common."[3] The seventh degree, which is the limit of sapindaship,[4] seems always to have been the limit.[5]

The presumption as to union applies to new families formed from the separation of members of an old family.[6] New families.

The property belonging to a joint family is hereinafter called the coparcenary property. Coparcenary property.

The expression used in the Mitakshara is translated as "ancestral property,"[7] *i.e.* property transmitted in the direct male line from a common ancestor; but having regard to the fact that under the decisions[8] all property held by the members of a Mitakshara family, as such, is ordinarily coparcenary property, and that in every case it cannot properly be described as "ancestral," it is, I think, more convenient to use the term "coparcenary."

WHO ARE COPARCENERS.

The members of the family who are entitled to an interest in the property of the family are hereinafter called coparceners. Coparceners.

Under the Bengal school the coparceners consist of the persons, whether male or female, entitled to shares in the coparcenary property by inheritance, transfer, or a will, or by Coparceners according to the Bengal school.

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1 *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 468. Mr. Ellis' remarks, Strange's "Hindu Law," ii. 347.

2 Introduction to "Study of Hinduism," by G. P. Sen, p. 89.

3 K. K. Bhattacharya's "Law Relating to the Joint Hindu Family," p. 137.

4 See *post*, p. 379.

5 K. K. Bhattacharya's "Law Relating to the Joint Hindu Family," pp. 136–138.

6 *Bata Krishna Naik* v. *Chintamani Naik* (1885), 12 Calc. 262.

7 *Pitrarjit*, as distinguished from *Swarjit*, self-acquired.

8 *Post*, pp. 238, 239. See *Karsondas Dharamsey* v. *Gangabai* (1908), 32 Bom. 479; 10 Bom. L. R. 184; *Haridas Lalji* v. *Narotam Raghavji* (1912), 14 Bom. L. R. 237.

virtue of some other mode of acquisition.[1] These shares are defined.[2]

There is under that school no right of survivorship. On the death of a coparcener his share passes by inheritance or by will. A son, therefore, cannot, as such,[3] as under the Mitakshara law, be a coparcener with his father.[4]

Power of disposition.

Under the Bengal school of law a Hindu may, without any restriction, dispose of his property [5] (although it may be an undivided share),[6] whether ancestral or self-acquired, by sale, mortgage, gift, or will, whether in favour of strangers or in favour of some of his own issue or relations, to the exclusion of others.[7]

This applies also to property,[8] the succession to which is governed by the law of primogeniture.[9]

The sons do not acquire any right in their father's property except under his will or as his heirs.[10]

In *Soorjeemoney Dossee (Sreemutty)* v. *Denobundhoo Mullick* (1857),[11] the Supreme Court of Bengal laid down the following propositions with regard to joint property governed by the Bengal school of law:—

1. "Each of the co-sharers has a right to call for a partition,[12] but until

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[1] As, for instance, when the property has been acquired by the joint exertions of the members of the family, or where persons who are not coparceners have been treated as such by the real coparceners; cf. *Girhi Rani Misrani* v. *Chandra Lal Kanth* (1912), 17 C. W. N. 62.

[2] *Soorjeemoney Dossee (Sreemutty)* v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at p. 553; 4 W. R. P. C. 114, at p. 115; *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27; 24 W. R. C. R. 234; 4 I. A. 153; see *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147.

[3] There might be a case of a son taking by a transfer or a will a share in property in which his father is also a sharer.

[4] See *Bejoy Krishna Ghosh* v. *Ashutosh Ghosh* (1908), 13 C. W. N. 396.

[5] The property is not coparcenary property, but is on the same footing as self-acquired property.

[6] *Post*, p. 299.

[7] *Ramkishore Acharj Chowdree* v. *Bhoobunmoyee Debea Chowdrain*, Ben. S. D. A. 1859, p. 229, at pp. 250, 251; *Bhoobunmoyee Debea Chowdhrain* v. *Ramkishore Acharj Chowdree* Ben. S. D. A. 1860, p. 485, at p. 489; *Kumla Kaunt Chukerbutty* v. *Gooroo Govind Chowdree* (1829), 4 Ben. Sel. R. 322 (2nd ed. 410); Certificate of judges of Bengal Sudder Dewanny Adawlut, set out in 6 Ben. Sel. R. at p. 73 (2nd ed., p. 85); *Tarnee Churn* v. *Dasee Daseea (Mussummaut)* (1824), 3 Ben. Sel. R. 397 (2nd ed., p. 530); *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886; Shamachurn Sircar's "Vyavastha Darpana," 2nd ed., 552 *et seq.*

[8] *Uddoy Additya Deb* v. *Jadublal Adittya Deb* (1879), 5 Calc. 113; 4 C. L. R. 181; S. C. on appeal (1881), 8 I. A. 248; 8 Calc. 199. *Narain Khootia* v. *Lokenath Khootia* (1881), 7 Calc. 461; 9 C. L. R. 243.

[9] *Post*, pp. 264, 265.

[10] See *Dharmadas Kundu* v. *Amulya Dhan Kundu* (1906), 10 C. W. N. 765.

[11] 6 M. I. A. 526, at p. 539.

[12] "Dayabhaga," chap. iii. s. 1, para. 16.

such partition takes place . . . the whole remains common stock; the co-sharers being equally interested in every part of it.

2. "On the death of an original co-sharer his heirs stand in his place and succeed to his rights as they stood at his death; his rights may also, in his lifetime, pass to strangers, either by alienation, or, as is the case of creditors, by operation of law;[1] . . . but in all cases those who come in, in the place of the original co-sharer, by inheritance, assignment, or operation of law, can take only his rights as they stand, including, of course, the right to call for a partition.

3. "Whatever increment is made to the common stock, whilst the estate continues joint, falls into and becomes part of that stock."

Coparceners according to the Mitakshara.

Under the Mitakshara law a male Hindu acquires by birth or adoption a vested interest in all coparcenary property[2] (whether ancestral or not,[3] and whether acquired before or after his birth[4] or adoption,[5] as the case may be), held by his father, or father's father, or father's father's father, at the time of his birth[6] or adoption, as the case may be, as members of a joint family even during their lifetime.[7]

Those persons who by birth or adoption so acquire an interest in the coparcenary property are coparceners.[8] A person can

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[1] *Post*, pp. 299–301.

[2] He does not by birth acquire an interest in a mere right of suit, or in an equitable right to procure an alteration in a grant: *Ujagur Singh (Chaudhri)* v. *Pitam Singh (Chaudhri)* (1881), 8 I. A. 190; 4 All. 120. He acquires an interest in *debutter* property; *Ram Chandra Panda* v. *Ram Krishna Mahapatra* (1906), 33 Calc. 507.

[3] *Karsondas Dharamsey* v. *Gangabai* (1908), 32 Bom. 479; 10 Bom. L. R. 184; see, however, *Jamna Prasad* v. *Ram Partap* (1907), 29 All. 667.

[4] *Ramanna* v. *Venkata* (1888), 11 Mad. 246; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at p. 581; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017, at p. 1021; *contrâ* per Mitter, J., *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131, at p. 134; S. C. *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R. 417, at p. 420.

[5] *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436.

[6] He acquires no interest in property which had ceased to belong to the family at the time of his birth; *Lachmi Narain Prasad* v. *Kishan Kishore Chand* (1915), 38 All. 126.

[7] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 99, 100; 5 Calc. 148, at p. 164; 4 C. L. R. 226, at p. 232; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731; 8 W. R. C. R. 15; 2 Ind. Jur. N. S. 216; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 155; *Karuppai Nachiar* v. *Sankaranaryana Chetty* (1903), 27 Mad. 300, at p. 313; *Subbayya* v. *Surayya* (1887), 10 Mad. 251, at p. 254; *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51, at p. 61; 10 All. 272, at pp. 284, 285; *Ram Narain Singh (Rajah)* v. *Pertum Singh* (1873), 11 B. L. R. 397, at pp. 401, 402; 20 W. R. C. R. 189, at p. 190; *Goor Surun Doss* v. *Ram Surun Bhukut* (1866), 5 W. R. C. R. 54; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436.

[8] They have, individually, no proprietary right until partition, which is treated by the Mitakshara as one of the sources of such right. See *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483.

also become a coparcener by the death of an ancestor whose existence excludes him from the coparcenership.[1]

All the coparceners are male descendants in the male line of the acquirer of the property.[2]

It is also said to be possible that a person can become a coparcener by treatment as such by the coparceners.[3]

Where property is acquired jointly by members of a family they are all coparceners therein.[4]

The interest that a son acquires is equal to that of his father. He does not acquire his title through his father, but separately and independently of his father.[5] He has no independent dominion over the property.[6]

The distance in degree from the founder of the family does not affect the right of coparcenership,[7] but the coparceners are limited to the head of each stock, and his sons, son's sons, and son's son's sons.[8]

Thus the body of coparceners cannot include any individual together with a male descendant of his other than his son, grandson, or great-grandson, or, in other words, no man can be a coparcener if his great-great-grandfather is also a coparcener.

If either his father, grandfather, or great-grandfather survive his great-great-grandfather, then he steps into the coparcenary on the death of the great-great-grandfather. If they all predecease his great-great-grandfather, he does not take, but the interest survives to the collaterals, if any. If there is no coparcener, then the heir of the great-great-grandfather takes by inheritance.

In *Moro Vishvanath* v. *Ganesh Vithal* [9] (1873), Nanabhai Haridas, J., said, "The rule which I deduce from the authority on the subject is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or original owner of the property, sought to be divided, but that it cannot be demanded by one more than four degrees

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[1] Below.

[2] Bhattacharya's "Hindu Law," 2nd ed., p. 323.

[3] *Girhi Rani Misrani* v. *Chandra Lal Kanth* (1912), 17 C. W. N 62.

[4] *Post*, p. 239.

[5] *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1.

[6] *Baldeo Das* v. *Sham Lal* (1875), 1 All. 77; *Beer Kishore Suhye Singh (Baboo)* v. *Hur Bullub Narain Singh (Baboo)* (1867), 7 W. R. C. R. 502.

[7] *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444; *Yenumala Gavuridevamma Garu (Sri Rajah)* v. *Yenumala Ramandora Garu (Sri Rajah)* (1870), 6 Mad. H. C. 93; *Girwurdharee Sing (Baboo)* v. *Kulahul Sing* (1825), 4 Ben. Sel. R. 9 (new edition, 12).

[8] See *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 449; Bhattacharya's "Hindu Law," 2nd ed., p. 323.

[9] 10 Bom. H. C. Rep. 444, at p. 465. As to the application of this principle to an impartible estate, see *Yenumala Gavuridevamma Garu (Sri Rajah)* v. *Yenumala Ramandora Garu (Sri Rajah)* (1870), 6 Mad. H. C. 93.

removed from the last owner, however remote he may be from the original owner thereof."

This is the only case in which a male member of a Mitakshara family who is free from defects which operate as grounds for exclusion from partition,[1] is not a coparcener. As he is not a *sapinda* of his great-great-grandfather, he does not on his death, in that case, become a coparcener.

An illegitimate son of a member of one of the three regenerate classes acquires no rights as coparcener in coparcenary property.[2] Illegitimate son

According to the Mitakshara school, an illegitimate son of a Sudra can inherit [3] and be a coparcener, if he be not the result of adulterous [4] or incestuous intercourse.[5]

An illegitimate son of a Sudra does not acquire an interest by birth, and therefore cannot claim partition against his father, or against his father's coparceners,[6] other than the sons of his father, or dispute his father's dealings with the coparcenary property,[7] but his father can permit him to have a share of the coparcenary property,[8] equal to that of a legitimate son.[9]

On the death of his father he becomes a coparcener with the legitimate sons, and on their deaths takes by survivorship.[10]

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[1] *Post*, pp. 228, 229.

[2] *Roshan Singh* v. *Balwant Singh* (1899), 27 I. A. 51, at p. 56; 22 All. 191, at p. 197; 2 Bom. L. R. 529; *Run Murdun Syn* (*Chuoturya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132. As to his right of maintenance, see *ante*, pp. 207, 208.

[3] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Sadu* v. *Baiza* (1878), 4 Bom. 37; *Sarasuti* v. *Mannu* (1879), 2 All. 134; *Hargobind Kuari* v. *Dharam Singh* (1884), 6 All. 329; *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407; *N. Krishnamma* v. *N. Papa* (1869), 4 Mad. H. C. 234; *Brindavana* v. *Radhamani* (1888), 12 Mad. 72, at p. 86. See *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 159; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at p. 43; "Manu," chap. ix. para. 179; "Yajnavalkya," chap. ii. para. 135; "Mitakshara," chap. i. s. xii.

[4] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Vencatachella Chetty* v. *Parvatham* (1875), 8 Mad. H. C. 134; *Dalip* v. *Ganpat* (1886), 8 All. 387.

[5] *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu* (1869), 4 Mad. H. C. 204. The right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged: *Soundararajan* v. *Arunachalam Chetty* (1915), 39 Mad. 136.

[6] *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407.

[7] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194.

[8] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194, at p. 203; "Mitakshara," chap. i. s. 12; "Vyavahara Mayukha," chap. iv. s. 4, para. 32; Colebrooke's "Digest," vol. iii. p. 143.

[9] *Karuppannan Chetti* v. *Bulokam Chetti* (1899), 23 Mad. 16.

[10] *Jogendra Bhupati Hurri Chundun Mahapatra* (*Raja*) v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151. S. C. in Court below (1885), 11 Calc. 702; *Sadu* v. *Baiza* (1878), 4 Bom. 37, at pp. 44, 45.

He can bring a suit against them for partition,[1] and his sons are entitled to share with the sons of legitimate sons.[2]

In case of a partition between the illegitimate sons and legitimate sons, the former are each entitled only to half a share of one of the latter.[3]

As he does not represent his father he has no right as against the undivided brothers of his father or against the sons of such brothers.[4]

He is thus only by right a coparcener when there are legitimate sons, and the father has died separated from his brothers.[5]

An illegitimate son who cannot inherit, or be a coparcener, is entitled to maintenance out of the property in which his father was a coparcener.[6] This right can be enforced against impartible property.[7]

As to his right of inheritance, see *post*, pp. 382–385, 423.

Under the Mitakshara law, a woman cannot become a coparcener [8] with male coparceners.[9]

There is nothing to prevent a female member of the family acquiring a right by adverse possession.[10]

Exclusion from coparcenership.

Under all the schools of law, those who by Hindu law are incapacitated by physical infirmity from inheriting, are also incapacitated from taking as coparceners, or from taking a share on a partition, but if they would otherwise be coparceners they are entitled to maintenance [11] for themselves and for the persons whom they are legally or morally bound to support,[12]

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[1] *Thangam Pillai* v. *Suppa Pillai* (1888), 12 Mad. 401.

[2] *Fakirappa* v. *Fakirappa* (1902), 4 Bom. L. R. 809.

[3] *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 344; *Chellammal* v. *Ranganatham Pillai* (1910), 34 Mad. 277; *Vencataram* v. *Vencata Lutchemee Ummal* (1817), 2 Str. N. C. 127, at p. 137; "Mitakshara," chap. i. s. 11; "Mayukha," chap. iv. s. 4, para. 32; Colebrooke's "Digest," vol. iii. p. 143.

[4] *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407; *Ranoji* v. *Kandoji* (1885), 8 Mad. 557; *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 346; *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32.

[5] See *Ramalinga Muppan* v. *Pavadai Goundan* (1901), 25 Mad. 519, at pp. 521, 522.

[6] "Dayabhaga," chap. ix. para. 28; "Mitakshara," chap. i. s. 12, para. 3. See *ante*, p. 208.

[7] *Run Murdun Syn* (*Chuoturya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. (P. C.) 15; 11 W. R. P. C. 6, *ante*, p. 208.

[8] *Punna Bibee* v. *Radhakissen Das* (1903), 31 Calc. 476.

[9] As to the cases where women hold jointly, see *post*, pp. 327, 328.

[10] *Sham Koer* v. *Dah Koer* (1902), 29 I. A. 132; 29 Calc. 664; 6 C. W. N. 657; 4 Bom. L. R. 547.

[11] *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*) (1881), 8 Calc. 149; 9 C. L. R. 457; *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919; "Mitakshara," chap. ii. s. 10; "Vyavahara Mayukha," chap. iv. s. 11; "Dayabhaga," chap. v.; "Daya-Krama-Sangraha," chap. iii.; *post*, p. 271.

[12] *Ante*, pp. 206–212.

and on a partition of the coparcenary property provision should be made for such maintenance.

As to the grounds of exclusion from inheritance, see *post*, pp. 368–374.

A physical defect, which although not congenital excludes from inheritance, will, if it develops before separation or partition, exclude from the coparcenary.

This is the view taken by the Bengal High Court,[1] and is based upon the Mitakshara.[2] The Allahabad High Court has taken a contrary view,[3] on the ground that the right vests on birth. It bases its decision upon a case of inheritance,[4] which stands upon a different footing. It is, it is submitted, clear that the view of the former Court is correct.

An excluded person who is cured of his malady after partition is apparently entitled to a share.[5]

This is an exception to the ordinary rule of Hindu law that an estate once vested cannot be devested.

A disqualification arising subsequent to separation does not exclude.[6]

It is apparently competent to the other coparceners to waive the objection of disqualification.[7]

There is nothing to prevent a disqualified person from acquiring property by gift,[8] or otherwise than by inheritance or partition.[9]

Would a coparcener who had murdered his coparcener be entitled on partition to anything more than the share to which he was entitled before such murder? It is submitted that he would not. Cf. *post*, p. 373.

The burden of proof is upon the person seeking to prove the disability.[10]

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[1] *Ram Sahye Bhukkut* v. *Laljee Sahye* (1881), 8 Calc. 149; 9 C. L. R. 457; *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919.

[2] Chap. ii. s. 10, paras. 6, 9.

[3] *Tirbeni Sahai* v. *Muhammad Umar* (1905), 28 All. 247.

[4] *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

[5] "Mitakshara," chap. ii. s. 10, para. 7; "Mayukha," chap. iv. s. 11, para. 2; "Viramitrodaya," chap. viii. ver. 4; Bhattacharya's "Law of the Joint Family," pp. 396, 397, 411–414. See, however, Mayne's "Hindu Law," 8th ed., p. 675.

[6] "Mitakshara," chap. ii. s. 10, para. 6. See *Shamachurn Audhiccaree Byragee* v. *Roop Doss Byragee* (1866), 6 W. R. C. R. 68.

[7] See *Muddun Gopal Lal* (*Lala*) v. *Khikhinda Koer* (*Mussumat*) (1890), 18 I. A. 9; 18 Calc. 341.

[8] See *Ganga Sahai* v. *Hira Singh* (1880), 2 All. 809.

[9] *Court of Wards* v. *Kupulmun Sing* (1873), 10 B. L. R. 364; 19 W. R. C. R. 164.

[10] *Helan Dasi* v. *Durga Das*, 1 C. L. J. 323; *Futtick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (1874), 22 W. R. C. R. 348; *Chunder Monee Debia* v. *Kristo Chunder Mojoomdar* (1872), 18 W. R. C. R. 375; *Issur Chunder Sein* v. *Ranee Dossee* (1865), 2 W. R. C. R. 125; *Nullit Chunder Gooho* v. *Bugola Soonduree Dossee* (1874), 21 W. R. C. R. 249. Cf. *Bhagaban Ramanuj Das* (*Mohunt*) v. *Roghunundun Ramanuj Das* (*Mohunt*) (1895), 22 I. A. 94; 22 Calc. 843.

The effect of exclusion from participation in the rights of the other members of the family is the same as if the person excluded were dead.[1]

So where the property of the coparcenary becomes vested in a single member, it is not devested by the birth of a son to the person who is disqualified,[2] but where it has not so vested the son by birth becomes a coparcener.[3]

Renunciation of interest.

In Madras and Bombay a coparcener, governed by the Mitakshara law, may renounce his interest in the coparcenary property either in favour of the body of coparceners, or in favour of one or more individual coparceners,[4] but in Bengal and the United Provinces he cannot renounce such interest without the consent of the whole body of coparceners.[5] He can only renounce such interest with the acquiescence of the other members on his being given some trifle out of the family property.[6]

By renouncing his interest, he does not affect the rights of his sons.[7]

Rights of Coparceners.

Rights of coparceners.

I. Subject to any power the manager may have to make arrangements for the enjoyment of the property,[8] each coparcener is entitled to joint possession of the coparcenary property with the other coparceners, and to the full enjoyment thereof.

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[1] See Bhattacharya's "Law of the Joint Family," pp. 420–423; *Bapuji Lakshman* v. *Pandurang* (1882), 6 Bom. 616; "Mitakshara," chap. ii. s. 10, para. 9; "Viramitrodaya," chap. viii. s. 6; "Vivada Chintamani" (Tagore's translation), p. 244; "Dayabhaga," chap. v. para. 19; "Smriti Chandrika," chap. v. para. 32; "Vyavahara Mayukha," chap. iv. s. 11, para. 11.

[2] *Bapuji Lakshman* v. *Pandurang* (1882), 6 Bom. 616.

[3] *Krishna* v. *Sami* (1885), 9 Mad. 64. As to the conflict between this case and *Bapuji Lakshman* v. *Dandurang* (1882), 6 Bom. 616, see Mayne's "Hindu Law," 8th ed., pp. 842–844.

[4] *Peddaya* v. *Ramalingam* (1888), 11 Mad. 406.

[5] See *Chandar Kishore* v. *Dampat Kishore* (1894), 16 All. 369. See *post*, p. 302. An arrangement by which the widow of a coparcener was allowed to retain his share was upheld in *Dal Chund* v. *Soonder (Mussumat)* (1867), 2 Agra, 173.

[6] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 156; "Mitakshara," chap. i. s. 2, paras. 11, 12; "Manu," chap. ix. para. 207.

[7] *Shivajirao Madhavrao* v. *Vasantrao Madhavrao* (1908), 33 Bom. 267; 10 Bom. L. R. 778.

[8] *Post*, p. 278.

Although he cannot sue for a share, he is entitled [1] to enforce his right to joint possession by a suit,[2] and is not necessarily forced to sue for partition.[3]

In a case governed by the Bengal school of law, the Judicial Committee said,[4] "If there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation, as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged, and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. . . . In India, a large proportion of the land, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which in ordinary course, in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which has been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists,[5] are to act according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

The mere fact of sole occupation by one coparcener does not necessarily constitute an ouster of other coparceners, nor does it entitle the latter to a decree for joint possession. Ouster means "dispossession" of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership.[6]

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[1] See *Hulodhur Sein* v. *Gooroodoss Roy* (1873), 20 W. R. C. R. 126, and cases, *post*, p. 267, note 5; *Surendra Narain Sinha* v. *Hari Mohan Misser* (1906), 33 Calc. 1201; *Stalkartt* v. *Gopal Panday* (1873), 12 B. L. R. 197; 20 W. R. C. R. 58; *Nundun Lall* v. *Lloyd* (1874), 22 W. R. C. R. 74.

[2] *Laluchand* v. *Girjappa* (1895), 20 Bom. 469.

[3] See *Kumud Lal Ray* v. *Jogendra Mohon Ray* (1914), 18 C. W. N. 609.

[4] *Watson and Company* v. *Ram Chand Dutt* (1890), 17 I. A. 110, at pp. 120, 121; 18 Calc. 10, at pp. 21, 22.

[5] See *ante*, p. 4.

[6] *Basanta Kumari Dassya* (*Sreemutty*) v. *Mohesh Chandra Shaha* (1913), 18 C. W. N. 328; *Israil* v. *Shamser Rahman* (1913), 41 Calc. 436.

The marriage of a younger brother before an elder brother,[1] or of a younger sister before an elder sister,[2] was prohibited.

For other instances, see Banerjee's "Law of Marriage," 3rd ed., pp. 54, 55; Bhattacharya's "Hindu Law," 2nd ed., pp. 85, 86.

WHO MAY INTERMARRY.

Restrictions on inter-marriage.

The following rules [3] as to identity of caste, exogamy, and prohibited degrees have been deduced from texts of the sages by Raghunandana,[4] who is said to be the highest authority in Bengal in all matters excepting inheritance,[5] and are reiterated by Kamalakara Bhatta in the *Nirnaya Sindhu*,[6] which is said to be of authority in the Benares school,[7] in the Bombay Presidency,[8] and in Southern India.[9]

Identity of caste.

1. Intermarriage between persons not belonging to the same primary caste is void.[10]

Subdivisions of caste.

This rule only prevents intermarriage between the four primary castes.[11] It does not prevent marriage between persons belonging to different subdivisions of the same primary caste.[12]

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[1] Banerjee's "Law of Marriage," 3rd ed., p. 42; Bhattacharya ("Hindu Law," 2nd ed., p. 83) says that this rule is imperative.

[2] Banerjee's "Law of Marriage," 3rd ed., p. 56.

[3] For a discussion of these rules, see Sarkar's "Hindu Law," 3rd ed., pp. 57–60.

[4] In his "Udvahatattwa."

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 36.

[6] Sarkar's "Hindu Law," 3rd ed., p. 92.

[7] *Ibid.*, Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[8] Mandlik's "Vyavahara Mayukha," Introduction, p. 73; Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[9] Bhattacharya's "Hindu Law," 2nd ed., p. 37.

[10] *Padam Kumari* v. *Suraj Kumari* (1906), 28 All. 458; *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552; *Lakshmi* v. *Kaliansing* (1900), 2 Bom. L. R. 128; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Steele, pp. 26, 29, 30; Colebrooke's "Digest," vol. iii. p. 141; "Vyavastha Darpana," 656; Strange's "Hindu Law," vol. i. p. 40; "Mitakshara," chap. i. s. 11, para. 2, and note. See *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619. In that case the judges assumed that *Vaidyas* were Vaisyas. As to the position of Vaidyas, see Bhattacharya's "Hindu Castes and Sects," pp. 159–171; Risley's "Tribes and Castes of Bengal," vol. i. pp. 46–50.

[11] *Ante*, pp. 22, 23.

[12] *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 158; 3 B. L. R. P. C. 1, at p. 4; 12 W. R. P. C. 41, at pp. 42, 43. See S. C. in Court below; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 483; *Upoma Kuchain* v. *Bholaram Dhubi* (1888), 15 Calc. 708; *Mahantawa* v. *Gangawa* (1909), 33 Bom. 693; 11 Bom. L. R. 822. See *Ramamani Ammal* v. *Kulanthai Natchear* (1871); 14 M. I. A. 346; 1 W. R. C. R. 1; Bhattacharya's "Hindu Law," 2nd ed., p. 85; Sarkar's "Hindu Law," 3rd ed., p. 103. A contrary view was expressed in *Melaram Nudial* v. *Thanooram Bamun* (1868), 9 W. R. C. R. 552, and by Mitter, J., in *Narain Dhara* v. *Rakhal Gain* (1875), 1 Calc. 1, at p. 4; 23 W. R. C. R

own habitation, he should not be treated as a trespasser. So also if a sharer seeing one of his co-sharers erect a house on a piece of joint land stand by and make no objection, a Court of Equity will presume his acquiescence to the erection of the building. From these two fundamental principles it follows that if the land covered by the building does not exceed appreciably the area that would represent such co-sharer's portion, and, further, if the objecting co-sharers do not object to the erection of the buildings in proper time, a Court of Equity will not favour the claim. But if in the case where the sharer makes his own selection the objection of the other co-sharers is made at or before the commencement of the building operations, a Court of Equity will favour the objectors, unless the portion taken up approximately represents the proper share of such co-sharer." [1] (See that work as to the authorities which establish this proposition.)

In the absence of an express agreement no claim for rent can be made against a coparcener occupying coparcenary property.[2]

A coparcener cannot, without the consent of the other coparceners, appropriate a share of the proceeds of family property for the purpose of an investment for himself.[3]

An individual member of a Mitakshara family cannot sue for a share of the coparcenary property,[4] but he can sue to be put in possession jointly with his coparceners.[5]

There is also authority that he may sue a trespasser alone.[6] At any rate, he may do so if he joins his coparceners as parties.

According to all the schools a coparcener is not entitled to sue for a declaration as to the amount of his share,[7] or to sue his coparceners for a portion of the property held by them.[8] His remedy is by partition.[9]

The possession of coparcenary property by one coparcener

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[1] See *Shadi* v. *Anup Singh* (1889), 12 All. 436.

[2] *Gobind Chunder Ghose* v. *Ram Coomar Dey* (1875), 24 W. R. C. R. 393. See *Alladinee Dossee* (*Sreemutty*) v. *Sreenath Chunder Bose* (1873), 20 W. R. C. R. 258.

[3] See *Bona Kooree* (*Mussamut*) v. *Boolee Singh* (*Baboo*) (1867), 8 W. R. C. R. 182.

[4] *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Phoolbas Kooer* v. *Juggessur Sahoy* (*Lalla*) (1872), 18 W. R. C. R. 48; *Chyet Narain Singh* v. *Bunwaree Singh* (1875), 23 W. R. C. R. 395; *Jugoo Lall Oopadhya* v. *Manoohur Lall Oopadhya* (1872), 19 W. R. C. R. 43.

[5] *Naranbhai Vaghjibai* v. *Ramchod Premchand* (1901), 26 Bom. 141; 3 Bom. L. R. 598; *Ramchandra Kashipatkar* v. *Damodar Trimbak Patkar* (1895), 20 Bom. 467. As to parties to suits, see *post*, pp. 267, 268.

[6] See *Radha Proshad Wasti* v. *Esuf* (1881), 7 Calc. 414; 9 C. L. R. 76; *Dursun Singh* v. *Durbijoy Singh*, 9 C. L. J. 623. As to a suit by a manager, see *Muhammad Sadik* v. *Khedan Lal* (1916), 1 Pat. L. J. 154, and *post*, pp. 267, 278, 279.

[7] *Raol Gorain* v. *Teza Gorain* (1870), 4 B. L. R. App. 90.

[8] *Trimbak Dixit* v. *Narayan Dixit* (1874), 11 Bom. H. C. 69; *Rutton Monee Dutt* v. *Brojomohun Dutt* (1874), 22 W. R. C. R. 333; *Gobind Chunder Ghose* v. *Ramcoomar Dey* (1875), 24 W. R. C. R. 393.

[9] See *post*, Chap. IX.

enures for the benefit of all the coparceners, so limitation does not begin to run against a coparcener until he has been excluded from possession.[1]

Limitation.

A suit by a person excluded from joint family property to enforce a right to share therein must be brought within twelve years from the time when the exclusion becomes known to the plaintiff.[2]

If he does not bring a suit within that time, the exclusion bars his right to relief.[3]

Where it is admitted or proved that the plaintiff was a member of a joint family, the burden of proving his exclusion, and his knowledge of such exclusion, for the period which would bar his right, lies upon the person asserting such exclusion.[4]

Adverse possession.

It is competent to a coparcener resisting a claim to property, which he is holding separately and which is alleged to be joint, to prove that he has acquired a right by adverse possession for twelve years.[5] But as the possession of one member of a joint family is the possession of all,[6] he cannot so acquire such rights unless he proves that the right has been claimed or openly asserted by other members of the family, and denied by him at least twelve years before suit.[7]

Similarly, a person entitled to property as his separate acquisition may lose his right in consequence of the family having held possession adverse to his exclusive right for a period of twelve years.[8]

Contribution.

When a coparcener applies his own funds for the purpose of paying off a debt due by the family, he may be entitled to contribution.[9]

II. A coparcener is entitled to receive from the coparcenary

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[1] See cases, below, note 6.

[2] Act IX. of 1908, Sched. I., art. 127. See *Sellam* v. *Chinnammal* (1901), 24 Mad. 441, and cases cited in U. N. Mitra's "Law of Limitation," in the notes to the above article.

[3] *Babaji Akoba* v. *Dattu Laxman* (1912), 37 Bom. 64; 14 Bom. L. R. 923.

[4] *Jivanbhat* v. *Anibhat* (1896), 22 Bom. 259; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197, at p. 202; *Dinkar Sadashiv* v. *Bhikaji Sadashiv* (1887), 11 Bom. 365; *Hari* v. *Maruti* (1882), 6 Bom. 741; *Malkappa* v. *Mudkappa* (1912), 37 Bom. 84; 14 Bom. L. R. 931.

[5] *Bainee Singh* v. *Bhurth Singh* (1866), 1 Agra, 162; *Runjeet Singh* v. *Madud Ali* (1868), 3 Agra, 222. See *Bhana Govind Guravi* v. *Vithoji Ladoji Guravi* (1866), 3 Bom. H. C. A. C. 170; *Parbati* v. *Muzaffar Ali Khan* (1912), 34 All. 289; 16 C. W. N. 1913; 14 Bom. L. R. 460.

[6] *Jogendra Nath Rai* v. *Baladeo Das* (1907), 35 Calc. 961; 12 C. W. N. 127; *Asud Ali Khan (Sheikh)* v. *Akbar Ali Khan* (1877), 1 C. L. R. 364; *Yusaf Ali Khan* v. *Chubbee Singh* (1873), 5 N. W. P. 122; *Malkappa* v. *Mudkappa* (1912), 37 Bom. 84; 14 Bom. L. R. 931; *Ahmad Raza Khan* v. *Ram Lal* (1914), 37 All. 203. This has, of course, no application after a separation; *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1908), 32 Mad. 191.

[7] *Shurfunnissa Bibee Chowdhrain* v. *Kylash Chunder Gungopadhya* (1875), 25 W. R. C. R. 53; *Rakhaldas Bundopadhya* v. *Indru Monee Debi* (1877), 1 C. L. R. 155; *Shamrao (Bhaiji)* v. *Hajimiya Mahamad* (1911), 14 Bom. L. R. 314. See *Lokenath Singh* v. *Dhakeshwar Prosad Narayan Singh* (1914). 20 C. W. N. 51.

[8] *Post*, p. 246.

[9] See Indian Contract Act (IX. of 1872), s. 69. R. C. Mitra's "Law of Joint Property," 2nd ed., chap. vi.

property maintenance for himself, his wife, and his children,[1] and for such persons as he is legally or morally bound to support,[2] and provision for all usual and proper religious observances which should be performed by himself and such persons,[3] also provision for the education of his sons, and for the marriage expenses of his daughters,[4] or of other female dependents of his family.

As to the amount of maintenance, see *ante*, p. 87.

As to the maintenance of such persons after the death of the coparcener, see *post*, p. 271.

All ancestral property is, while it remains undisposed of and unpartitioned, charged with the maintenance of all persons who are entitled to maintenance therefrom [5] in the same sense that the maintenance of a widow is charged upon the estate of her husband.[6]

As to maintenance from a *tarwad*, see *Maradevi* v. *Pammakka* (1911), 36 Mad. 203; *Kunchi* v. *Ammu* (1912), *ibid.*, 591; *Muthu Amma* v. *Gopadan* (1912), *ibid.*, 593.

As to maintenance from the property of a *tavazhi*, see *Naku Amma* v *Raghava Menon* (1912), 38 Mad. 79.

III. A coparcener is entitled to receive such information as he may require as to the management of the property,[7] and to be consulted in matters of great importance thereto, such as the sale or mortgage of the property, or of any portion thereof.

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[1] *Ayyavu Muppanar* v. *Niladatchi Ammal* (1862), 1 Mad. H. C. 45; "Manu," chap. ix. para. 108; "Narada Smriti," chap. ix. paras. 26–28; Bhattacharya's "Law of the Joint Family," pp. 280, 281. It has been held (12 Bom. H. C. 96, note) that a coparcener who can sue for partition cannot sue for maintenance, but it is submitted that there is no reason why he should be forced to such a proceeding. As to daughters, see *Mankoonwur* v. *Bhugoo* (1822), 2 Borr. 139, at p. 144; *ante*, p. 207. As to sisters, see "Yajnavalkya," bk. ii. chap. v. para. 124A.

[2] *Ante*, pp. 206–212. "Narada Smriti," chap. xiii. paras. 26–28, 33; K. K. Bhattacharya's "Law of the Joint Family," p. 293; R. C. Mitra's "Law of Joint Property," 2nd ed., pp. 57–59.

[3] "The indispensable duties alluded to in the 'Mitakshara,' are undoubtedly the annual sradhs, the ceremony of investiture with sacred thread among the three superior castes, the marriage of the minor girls of the family, where such marriage must be celebrated before the girls arrive at the age of puberty (see *ante*, p. 33), and other religious ceremonies enjoined by the sacred writings, necessary to be performed at stated times and the non-performance of which would be a cause of sin, or forfeiture of caste, or would lower the position of the family," K. K. Bhattacharya's "Law of the Joint Family," p. 277.

[4] *Ante*, pp. 52, 53. See *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512.

[5] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. H. C. 63. As to impartible property, see *Mallikarjuna Prasada Nayudu* (*Raja Yarlagadda*) v. *Durga Prosada Nayudu* (*Raja Yarlagadda*) (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74; 2 Bom. L. R. 945.

[6] *Ante*, pp. 89–93.

[7] See *post*, chap. vii.

IV. A coparcener is entitled to sue to impeach and to restrain the acts of the manager or of other coparceners which are in excess of their powers.[1]

V. Except that under the Mitakshara school of law there can be no partition directly between grandfather and grandson while the father is alive, or between great-grandfather and great-grandson when the father or grandfather is alive, every adult coparcener is entitled to obtain a partition of the property when he desires to be separated from the coparcenary.[2]

This right exists as long as there is a joint tenancy.[3]
As to minors, see *post*, pp. 328, 329.

Where father is manager.

" The rights of the coparceners in . . . an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons,[4] and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate." [5]

Effect of death of coparcener.

On the death of a coparcener, subject to the Mitakshara school of law, his interest in the coparcenary property [6] does not pass by inheritance. It lapses, or, as it is generally put, his rights pass by survivorship to the other coparceners,[7] subject

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[1] *Post*, p. 304. See *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Anant Ramrav* v. *Gopal Balvant* (1894), 19 Bom. 269; *Ganpat* v. *Annaji* (1898), 23 Bom. 144; *Ramchandra Kashi Patkar* v. *Damodhar Trimbak Patkar* (1895), 20 Bom. 467; *Gopee Kishen Gossain* v. *Hem Chunder Gossain* (1870), 13 W. R. C. R. 322, at p. 323.

[2] *Post*, chap. viii. He is not entitled to sue only for a declaration of his right to a share, or to claim otherwise than in a partition suit property held by the family as joint, *ante*, p. 233.

[3] *Bisheshar Das* v. *Ram Prasad* (1906), 28 All. 627.

[4] *Post*, chap. viii.

[5] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 100, 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233. See *Subbayya* v. *Surayya* (1887), 10 Mad. 251, at p. 254. *Post*, p. 269.

[6] Whether ancestral or not, *Gobardhan Sahu* v. *Bulkhan Mahton* (1916), 1 Pat. L. J. 195.

[7] *Rajnarain Singh* v. *Heeralal* (1878), 5 Calc. 142; *Bhimul Doss* v. *Choonee Lall* (1877), 2 Calc. 379; *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105; *Jankibai* v. *Shrinivas Ganesh* (1913), 38 Bom. 120; 15 Bom. L. R. 853. To the exclusion of the widow, *Parbati Kumari Debi (Srimati Rani)* v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 96; 29 Calc. 433, at p. 452; 6 C. W. N. 490, at p. 494; 4 Bom. L. R. 365; or other heir, see *Bhimul Doss* v. *Choonee Lall* (1877), 2 Calc. 377; *Debi Parshad*

to the rule that where he leaves male issue they represent his rights to a partition.[1] His death also has the effect of introducing into the coparcenary one who is excluded by the rule which limits the coparcenary to four generations.[2]

This process continues until partition.[3]

According to the principles of Hindu law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.[4]

The right to partition determines the right to take by survivorship.[5]

This principle of survivorship applies also to a *tarwad*.[6]

Where there is no coparcener, property, which would otherwise be coparcenary, passes by inheritance to the heirs of the deceased.[7] There is no inheritance while there is a surviving coparcener, however remotely connected with the deceased.[8]

In a case governed by the Bengal school of law the interest of the coparcener passes on his death by will or inheritance.[9]

Where there is a joint family business the death of a member of the family does not *per se* dissolve the business.[10]

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v. *Thakur Dial* (1875), 1 All. 105; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. 31; 12 W. R. F. B. 1; S. C. *Sudabart Pershad Sahoo* v. *Lotf Ali Khan* (1870), 14 W. R. C. R. 339; *Benee Pershad* v. *Mohaboodhy* (*Mussamut*) (1867), 7 W. R. C. R. 292; *Mooniah* (*Mussamut*) v. *Teeknoo* (*Mussamut*) (1867), 7 W. R. C. R. 440; *Ratan Dabee* v. *Modhoosoodun Mohapator* (1878), 2 C. L. R. 328. The enlarged share is subject to the same incidents as the original share: *Gungoomull* v. *Bunseedhur* (1869), 1 N. W. P. H. C. 170. The Curators Act (XIX. of 1841) has no application: *Sato Koer* v. *Gopal Sahu* (1907), 34 Calc. 929; 12 C. W. N. 65.

[1] *Post*, p. 327. See *Manjanatha* v. *Narayana* (1882), 5 Mad. 302.

[2] *Ante*, pp. 225, 226.

[3] *Rajnarain Singh* v. *Heeralall* (1878), 5 Calc. 142.

[4] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 615; 2 W. R. P. C. 31, at pp. 39, 40.

[5] *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at p. 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; 4 Bom. L. R. 657. See *Jogeswar Narain Deo* v. *Ramchund Dutt* (1896), 23 I. A. 37, at p. 44; 23 Calc. 670, at p. 679.

[6] *Ummanga* v. *Appadorai Patter* (1910), 34 Mad. 387.

[7] *Post*, p. 298.

[8] *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1875), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191; *Ratan Dabee* v. *Modhoosoodun Mohapator* (1878), 2 C. L. R. 328.

[9] *Ante*, pp. 224, 225.

[10] *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38, at p. 40; *In the matter of Haroon Mahomed* (1890), 14 Bom. 189, at p. 194. As to the death of the manager, see *post*, pp. 275, 276.

Under Mitakshara shares not defined.

Under the Mitakshara school, the shares of coparceners are not defined until there be a separation, or the members of the family agree among themselves with regard to particular property that it shall henceforth be the subject of ownership in defined shares.[1]

The removal of coparceners by death, and the accession of new coparceners by birth, is continually affecting the interest of the coparceners to the extent that it increases or diminishes the share, which, if there were a partition, would be allotted to them respectively, but until separation no coparcener has a greater interest in the coparcenary property than any one of the other coparceners.

In the well-known case of *Appovier* v. *Rama Subba Aiyan* (1866),[2] Lord Westbury said, "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family."[3]

A coparcener in a Mitakshara family has no specific property in the coparcenary property, but only an interest which may ripen into specific property on a partition.[4]

COPARCENARY PROPERTY.

Coparcenary property consists of—

Nature of coparcenary property.

(*a*) All property[5] in which the members of a joint family have a common interest and a common possession, and therefore a right to partition.[6]

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[1] *Post*, chap. ix.

[2] 11 M. I. A. 75, at pp. 89-90; 8 W. R. P. C. 1.

[3] As to the right to joint possession, see *ante*, pp. 230, 231.

[4] *Subramanya Pandya Chokka Talaver* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316, at p. 327.

[5] This includes an occupancy holding: *Mahabir Singh* v. *Bhagwanth* (1916), 38 All. 325.

[6] *Katama Natchiar* v. *Shivagunga (Rajah of)* (1863), 9 M. I. A. 543, at p. 615; 2 W. R. P. C. 1, at pp. 39, 40; *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayamma (Raja Chelikani)* (1902), 29 I. A. 156, at p. 164; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; 4 Bom. L. R. 657; *Karsondas Dharamsey* v. *Gangabai* (1908), 32 Bom. 479; 10 Bom. L. R. 184. See *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197.

"The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."[1] *I.e.* in other cases the co-holders hold as tenants in common, as, for instance, in the case of a transfer to one member of a coparcenary and the widow of another member.[2]

Property held jointly.

Thus property acquired by a transfer to the members of the family jointly belongs to the coparcenary.[3]

Joint transfer.

Where property has been acquired jointly in business or otherwise by their joint labour by the members of a joint family, even without resort to the family funds,[4] it is to be presumed to be the property of the family as such,[5] but this presumption may be rebutted by proof that there was only an ordinary partnership, that is to say, a partnership which was the creature of contract, and not of birth and relationship, in which case the members would be entitled to share in accordance with their shares in the partnership, and there would be no rights of survivorship, or other incidents of coparcenary property.[6]

Acquisitions by family.

The presumption does not apply when the business is carried on by some only of the members of the family without any aid from the family funds.[7]

Mr. Mayne contends that in the case of property acquired by the joint exertions of the members of the family, but without any aid from the family funds, the sons would acquire no interest by birth.[8] "If the

[1] *Jogeswar Narain Deo* v. *Ram Chund Dutt* (1896), 23 I. A. 37, at p. 44; 23 Calc. 670, at p. 679; *Gopi* v. *Jaldhara (Musammat)* (1910), 33 All. 41. As to a joint bequest, see Phillips and Trevelyan's "Hindu Wills," 2nd ed., pp. 55, 56.

[2] *Veeraraghava Reddi* v. *Kota Reddi* (1916), 31 Mad. L. J. 465.

[3] *Radhabai* v. *Nanarav* (1879), 3 Bom. 151. Cf. Transfer of Property Act (IV. of 1882), s. 45.

[4] See *Rampershad Tewarry* v. *Sheochurn Doss* (1866), 10 M. I. A. 490, at p. 506; *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197, and cases note 6 below. See Colebrooke's "Digest," vol. iii. p. 386; "Mitakshara," chap. i. s. 4, para. 15; "Manu," chap. ix. para. 215. See, however, *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at pp. 445, 446. As to property acquired with the aid of family funds, see *post*, pp. 246, 247.

[5] *Gopalasami Chetti* v. *Arunachelam Chetti* (1903), 27 Mad. 32; *Haridas Lalji* v. *Narotam* (1912), 14 Bom. L. R. 237, and cases below, note 6.

[6] See *Rampershad Tewarry* v. *Sheochurn Doss* (1866), 10 M. I. A. 490, at p. 506; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 445; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 156; *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll* (1890), 18 Calc. 86. For an instance of a partnership between members of a joint family and a stranger, see *Anant Ram* v. *Channu Lal* (1903), 25 All. 378.

[7] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149.

[8] "Hindu Law," 8th ed., p. 355. See also *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at pp. 445, 446.

joint acquirers intended to hold the property so acquired as co-owners, and not as joint family property in the Mitakshara sense of the expression, this view would be perfectly sound. But if, as supposed, the property was acquired by all the members of the undivided family, by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property, and in that case their male issue, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property." [1]

"It is clear that where a Hindu father starting upon nothing begins to earn money for himself, it does not necessarily follow because he may have infant children whom he feeds and clothes and houses, that he intends, or they expect, that his individual earnings should become a common fund, and so have all the legal incidents of joint family property. As the children grow up, particularly when they are associated with the father in his business, it becomes more and more difficult to define with any accuracy the point at which and the conditions under which accumulations of one kind become accumulations of the other." [2]

Gift or devise to joint family.

It has been held that in the case of a gift or a devise to the members of a joint family, the property would not be held as coparcenary property,[3] but there is nothing to prevent a gift or devise to a joint family.[4] It is submitted that property given or devised to all the members of a joint family would in the absence of the expression of a contrary intention be coparcenary.[5]

It has been suggested [6] that the view submitted above might be inconsistent with the Tagore case,[7] inasmuch as unborn persons might on birth obtain rights in the coparcenary. Recent decisions as to a gift to a class,[8] and the provisions of the Hindu Disposition of Property Act, 1916 (*post*, pp. 536–539), negative this suggestion.

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[1] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 155, 156.

[2] *Haridas Lalji* v. *Narotam* (1911), 14 Bom. L. R. 237, at p. 243.

[3] *Kishori Dubain* v. *Mundra Dubain* (1911), 33 All. 665; *Diwali (Bai)* v. *Bechardas (Patel)* (1902), 26 Bom. 445; 4 Bom. L. R. 102.

[4] *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 154, 155.

[5] *Ante*, p. 238, note 6; p. 239, note 1; *Radhabai* v. *Nanarav* (1879), 3 Bom. 151. See *Yethirajulu Naidu* v. *Mukunthu Naidu* (1905), 28 Mad. 363, at p. 369; *Kunhacha Umma* v. *Kutti Mammi Hajee* (1892), 16 Mad. 201.

[6] *Diwali (Bai)* v. *Bechardas (Patel)* (1902), 26 Bom. 445, at p. 448; 4 Bom. L. R. 102; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 154, 155.

[7] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. C. R. 359.

[8] *Bhagabati Barmanya* v. *Kali Charan Singh* (1911), 38 I. A. 54; 38 Calc. 468; 15 C. W. N. 393; 13 Bom. L. R. 375; S. C. in Court below (1905), 32 Calc. 992; 9 C. W. N. 749; *Radha Prasad Mallick* v. *Ranimoni Dasi* (1910), 38 Calc. 188; reversed on another point (1908), 35 I. A. 118; 35 Calc. 896; 12 C. W. N. 729; 10 Bom. L. R. 604; *Bishen Chand (Rai)* v. *Asmaida Koer* (1883), 11 I. A. 164; 6 All. 560; *Ram Lall Sett* v. *Kanailall Sett* (1886), 12 Calc. 663; *Advocate-*

Acquired by compromise.

Whether property, which may have been ancestral, but has been acquired by virtue of a compromise or arrangement, belongs to the coparcenary depends upon the nature of the arrangement.[1]

Maternal grandfather's property.

Property inherited from the maternal grandfather by two or more grandsons (by the same daughter) living as members of a joint family,[2] and holding the same jointly, is, in a case governed by the Mitakshara law, on a similar footing.

It is submitted that where the grandsons are by different daughters the property would not be coparcenary, as they belong to different families.[3]

A Full Bench of the Madras High Court has declined to extend this principle to property inherited from a woman by her sons as heirs of her *stridhan* [4] or to property inherited by sister's sons, and expressed their inability to apply it "to cases other than those in which the inheritance devolves from a paternal or maternal male ancestor on his lineal descendants whether as 'unobstructed,' or as 'obstructed heritage.'" [5] They point out that whereas the class of daughters' sons is incapable of being added to after the vesting, the class of sister's sons could be added to after the vesting by the birth of others.[6]

It is submitted that the principles enunciated by the Privy Council [7] apply only to property held by the sons of one sister jointly.

"Unobstructed" succession.

(*b*) In cases governed by the Mitakshara school of law, all property, whether movable or immovable,[8] and however originally acquired,[9] which is inherited by what is called "unobstructed heritage," [10] *i.e.* which is inherited from a

General v. *Karmali Rahimbai* (1903), 29 Bom. 133. See Phillips and Trevelyan's "Law of Hindu Wills," 2nd ed., pp. 33, 34.

[1] *Mahabir Kower* v. *Jubha Sing* (1871), 8 B. L. R. 38; 16 W. R. C. R. 221.

[2] *Venkayyamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at pp. 164, 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; 4 Bom. L. R. 657; overruling *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, and *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70; *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar* (1903), 27 Mad. 382. As to the case where a single grandson by daughter inherits, see *post*, pp. 242, 243

[3] *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar* (1903), 27 Mad. 382, at p. 385.

[4] The same view was taken in *Parson* (*Bai*) v. *Somli* (*Bai*) (1912), 36 Bom. 424; 14 Bom. L. R. 400.

[5] *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1903), 27 Mad. 300, at p. 314.

[6] *Ibid.*, at p. 309.

[7] *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156, 25 Mad. 678; 7 C. W. N. 1; 4 Bom. L. R. 657.

[8] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 570–574. This includes a right of occupancy, *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234.

[9] *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 450; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104.

[10] *Apratibandha Daya* (inheritance not liable to be obstructed) as distinguished from *Sapratibandha Daya* (inheritance liable to be obstructed, *post*, p. 253). The distinction between

natural or adopted[1] father, father's father, or father's father's father, is coparcenary property[2] as regards the issue of the person so inheriting it.[3]

"In the 'Mitakshara,' chap. i. s. 1, v. 3, heritage is said to be 'of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction.'"[4]

Allotted to widow for maintenance

Property inherited after the death of a widow to whom it was assigned in lieu of maintenance is on the same footing.[5]

Collateral relations.

It is only the descendants of the person so inheriting, who acquire an interest in the property. Collateral relations who happen to be joint with such person acquire no such interest.[6]

Inheritance from maternal grandfather.

It is unsettled whether property inherited from the maternal grandfather by a single grandson[7] is also coparcenary property.

The Madras decisions hold that property inherited by a daughter's son

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the two forms of heritage is the same as the distinction between inheritance by an heir at law, and inheritance by an heir presumptive. In the latter case there is a possibility of a nearer heir being born. In the former case there is no such possibility.

[1] This has no application to property inherited by a person adopted according to the *illatom* system (*ante*, p. 160); *Challa Papi Reddi* v. *Challa Koti Reddi* (1872), 7 Mad. H. C. 25. See *Ramakristna* v. *Subbakka* (1889), 12 Mad. 442.

[2] *Nund Coomar Lall* (*Baboo*) v. *Razeeoddeen Hossein* (1872), 10 B. L. R. 183; 18 W. R. C. R. 477; *Nallatambi Chetti* (*Rayadur*) v. *Mukunda Chetti* (*Rayadur*) (1868), 3 Mad. H. C. 455; *Jawahir Singh* v. *Guyan Singh* (1868), 3 Agra, H. C. 78; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528; *Gunga Prosad* v. *Ajudhia Pershad Singh* (1881), 8 Calc. 131, at p. 134; 9 C. L. R. 417, at pp. 421, 422. See also *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33 (overruled by the Judicial Committee on another point, *ante*, p. 241); *Ramnarain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397, at p. 401; 20 W. R. C. R. 189, at p. 190; *Janki* v. *Nandram* (1888), 11 All. 194. See J. C. Ghose's "Hindu Law," 2nd ed., pp. 375, 376; "Viramitrodaya," G. C. Sarkar's translation, p. 72.

[3] *Gurumurthi Reddi* v. *Gurammal* (1908), 32 Mad. 86, at p. 88. It is otherwise as regards other persons, see *Janki* v. *Nandram* (1888), 11 All. 194, at p. 198.

[4] *Nund Coomar Lall* (*Baboo*) v. *Razeeooddeen Hossein* (1872), 10 B. L. R. 183, at p. 191; 18 W. R. C. R. 477, at p. 479; *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105, at p. 112.

[5] *Beni Parshad* v. *Puran Chand* (1895), 23 Calc. 262, at p. 273.

[6] See *Gopal Dutt Pandey* v. *Gopallal Misser*, Ben. S. D. A., 1859, p. 1314; *Janki* v. *Nandram* (1888), 11 All. 194, at p. 198.

[7] As to where there are several grandsons, see *ante*, p. 241.

is coparcenary.[1] The Bengal and Allahabad High Courts have entertained a different view,[2] and there is no reported decision in Bombay on the subject.[3]

The Judicial Committee has held that such property is not "self-acquired." [4] This expression may, however, not have been used in a technical sense.[5] In a more recent case [6] the Judicial Committee said, "Unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, . . . they are not deemed ancestral in Hindu Law."

Another decision of the Judicial Committee dealt with the rights of daughter's sons, living jointly,[7] but that case is distinguishable.[8]

See "Mitakshara," chap. i. s. 1, paras. 3, 5, 21, 24, 27, 33; s. 5, paras. 2, 3, 5, 9, 11. According to Mr. H. T. Colebrooke's translation of the "Mitakshara" separate property means "that which has been acquired by the coparcener himself without any detriment to the goods of his father or mother." [9]

Mr. J. C. Ghose ("Hindu Law," 2nd ed., p. 375) points out that Mr. Colebrooke's translation of chap. i. s. 1, para. 27, of the "Mitakshara," in which he says that "it is a settled point that property in the paternal or ancestral estate is by birth," is erroneous, the words really being "paternal or grandpaternal." It is submitted that according to the better view property inherited from a maternal grandfather is not coparcenary except in the case of grandsons who are living in coparcenary.[10]

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[1] *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar* (1903), 27 Mad. 382; *Rangammal* v. *Echammal* (1898), 22 Mad. 305; *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1903), 27 Mad. 300, at pp. 313, 314; *Muttayan Chetti* v. *Sangili Vira Pandia Chinna Tambiar* (1879), 3 Mad. 370 (this question did not arise on appeal in this case (1882), 9 I. A. 128; 6 Mad. 1; 12 C. L. R. 169); *Sivaganga Zemindar* v. *Lakshmana* (1885), 9 Mad. 188, at p. 190. These last two cases were doubted in *Venkataramanayamma Garu (Sri Raja Chelikani)* v. *Appa Rau Bahadur Garu* (1897), 20 Mad. 207, at p. 219, which was reversed on a different point by the Judicial Committee; see *Venkayyamma Garu (Raja Chelikani)* v. *Venkataramanayyamma (Raja Chelikani)* (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1; 4 Bom. L. R. 657.

[2] *Jasoda Koer* v. *Sheopershad Singh* (1889), 17 Calc. 33, at p. 38 (differed from on another point in *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayyamma (Raja Chelikani)* (1902), 29 I. A. 156; 25 Mad. 678; 4 Bom. L. R. 657; *Jamna Prasad* v. *Ram Partap* (1907), 29 All. 667.

[3] See *Nanabhai Ganpatrav Dhairyavan* v. *Achratbai* (1886), 12 Bom. 122, at p. 134.

[4] *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1882), 9 I. A. 128, at p. 143; 6 Mad. 1, at p. 16; 12 C. L. R. 169, at p. 182. In the Court below, the High Court held (*Muttayan Chetti* v. *Sangili Vira Pandia Chinna Tambiar*, 3 Mad. 370, at p. 375) that the sons could not interfere with their father's action with regard to it, but there is, it is submitted, no reason for this distinction.

[5] *Post*, pp. 248, 249.

[6] *Atar Singh* v. *Thakar Singh* (1908), 35 I. A. 206, at p. 211; 35 Calc. 1039, at p. 1045; 12 C. W. N. 1049, at p. 1052; 10 Bom. L. R. 790.

[7] *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayyamma (Raja Chelikani)* (1902), 29 I. A. 156; 25 Mad. 678; 4 Bom. L. R. 657.

[8] *Jamna Prasad* v. *Ram Partap* (1907), 29 All. 667.

[9] Chap. i. s. 4, para. 2. The words "or mother" having been interpolated by the "Mitakshara" in the text of "Yajnavalkya" (bk. ii. v. 118); see R. C. Mitra's "Law of Joint Property," 2nd ed., p. 43.

[10] See *ante*, p. 241.

Shares allotted on partition.

(c) In cases governed by the Mitakshara school of law, the share of coparcenary property allotted to any member on partition becomes coparcenary property as regards his issue,[1] whether such issue were or were not born at the time of partition.[2]

As to the rights of a surviving member of a coparcenary, see *post*, p. 298.

The circumstance that the person to whom the property is allotted discharges it from encumbrances does not alter its nature.[3] If the person to whom the property has been allotted has no issue, it passes to his heir.[4]

Gift or devise by father.

(d) Self-acquired property, given or devised by a Hindu governed by the Mitakshara school of law to a son is, according to the High Courts of Bengal and Madras, in the absence of any contrary intention appearing from the gift or will,[5] to be taken to be coparcenary property, so far as the issue of that son are concerned.[6] The Bombay and Allahabad High Courts repudiate such presumption.[7]

Where coparcenary property purports to be given or devised to a son or other coparcener its character would be obviously unchanged,[8] even where such gift or devise is permissible.[9]

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[1] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; 9 Bom. L. R. 597; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438; *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur* (1877), 3 Calc. 1; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Lakshmibai* v. *Ganpat Moroba* (1868), 5 Bom. H. C. O. C. J. 129; *Mewa Koonwer* (*Ranee*) v. *Oudh Beharee Lall* (*Lalla*) (1867), 2 Agra, 311. See *Khandubai* v. *Pirbhai* (1900), 2 Bom. L. R. 76.

[2] In *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur* (1877), 3 Calc. 1, the son was not born at the time of the partition.

[3] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

[4] See *Bejai Bahadur Singh* v. *Bhupindar Bahadur Singh* (1895), 22 I. A. 139; 17 All. 456.

[5] In *Laksmibai* v. *Ganpat Moroba* (1868), 5 Bom. H. C. O. C. 128, the property was given to the grandsons in severalty.

[6] *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Hazari Mall Babu* v. *Abaninath Adhurjya* (1912), 17 C. W. N. 280. See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50.

[7] See *Nanabhai Ganpatrav Dhairayavan* v. *Achratbai* (1886), 12 Bom. 122, at pp. 131, 132. (As in this case the devise was to the sons jointly the property was coparcenary, *ante*, p. 240.) *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528; *Parsotam Rao Tantia* v. *Janki Bai* (1907), 29 All. 354.

[8] See *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 50, at p. 55; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104; *Nanomi Babuasin* (*Mussamut*) v. *Modun Mohun* (judgment of High Court, 1882), 13 I. A. 1, at pp. 5, 6; 13 Calc. 21.

[9] See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561, at p. 563; affirmed on appeal (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320.

(e) The joint property of reunited coparceners.[1] Reunion.

(f) Property which was originally the separate[2] property of an individual member of a joint family, but has been treated by him as coparcenary property, belongs to the coparcenary.[3] Property treated as coparcenary.

As, for instance, where the head of the family kept one account of his ancestral and self-acquired property.[4] When the funds are once intermixed they cannot be separated.[5]

Where the members of a family put their separate earnings into the joint stock, the proceeds of such earnings are to be presumed to be joint.[6] The treatment must be such as to show unmistakably an intention to throw the property into the common stock. Where it is plain that no gift can have been intended, none can be inferred.[7]

A mere grant of a portion of self-acquired property for the maintenance of a son would not make the property coparcenary.[8]

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1 *Jasoda Koer* v. *Sheo Pershad Singh* (1889), 17 Calc. 33, at p. 38; *Narasimha Charlu (Samudrala Varaha)* v. *Venkata Singaramma (Samudrala)* (1909), 33 Mad. 165. As to reunion, see *post*, pp. 359, 360.

2 *Post*, pp. 248 *et seq.*

3 *Sethuramaswamiar* v. *Meruswamiar* (1909), 34 Mad. 470; *Gopalasami* v. *Chinnasami* (1884), 7 Mad. 458; *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan* (1890), 15 Bom. 32, at p. 39; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 154; *Tottempudi Venkataratnan* v. *Tottempudi Seshamma* (1903), 27 Mad. 228. See *Venkayyamma Garu (Raja Chelikani)* v. *Venkataramanayyamma (Raja Chelikani)* (1902), 29 I. A. 156, at p. 166; 25 Mad. 678, at p. 688; 7 C. W. N. 1, at pp. 9, 10; 4 Bom. L. R. 657; *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397; *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Hardeo Bux (Thakoor)* v. *Jawahir Singh* (1877), 4 I. A. 178; 3 Calc. 522; S. C. (1879), 6 I. A. 161; *Rampershad Tewarry* v. *Sheo Churn Doss* (1866), 10 M. I. A. 490, at pp. 505, 506; *Birajun Koer* v. *Luchmi Narain Mahata* (1884), 10 Calc. 392, at p. 398; *Tribhovandas* v. *Smith* (1896), 21 Bom. 349; S. C. in Court below (1895), 20 Bom. 316; *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429; *Himmat Bahadur* v. *Bhawani Kunwar* (1908), 30 All. 352. See *Gobardhan Sahu* v. *Bulkhan Mahton* (1916), 1 Pat. L. J. 195. As to Government grants, see *post*, pp. 251, 252.

4 *Indar Sahai (Munshi)* v. *Shiam Bahadur (Kunwar)* (1912), 17 C. W. N. 509; 15 Bom. L. R. 2118.

5 *Haridas* v. *Velji* (1913), 15 Bom. L. R. 584.

6 *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; 9 Bom. L. R. 597; *Chabildas Lallubhai* v. *Ramdas Chabildas* (1909), 11 Bom. L. R. 606; *Gobardhan Sahu* v. *Bulkhan Mahton* (1916), 1 Pat. L. J. 195.

7 *Tajmulali (Moulvi Syed)* v. *Jaga Mohan Das* (1916), 1 Pat. L. J. 529; *Haridas Lalji* v. *Narotam* (1911), 14 Bom. L. R. 237, *ante*, p. 240.

8 See *Muddun Gopal Lal (Lala)* v. *Khikhinda Koer (Mussumat)* (1890), 18 I. A. 9, at p. 21; 18 Calc. 341, at p. 348; *Timannacharya* v. *Balacharya* (1902), 4 Bom. L. R. 257.

Right by prescription.

The right to claim property as separate may be barred by the operation of the law of Limitation.[1]

Accretions and acquisitions.

(*g*) Accretions to coparcenary property. Property acquired out of the income or with the aid[2] or on the credit[3] of coparcenary property, whether movable or immovable,[4] the income of such property,[5] the proceeds of sale of such property, and property purchased out of such proceeds,[6] or from movable property belonging to the family,[7] are coparcenary property.

Form of transfer.

The form of the transfer[8] or the fact that the property was purchased or settled in the name of a particular member of the family[9] is immaterial.[10]

Slight or indirect aid.

Where the acquirer has received merely trifling aid from the family property[11] or where the family property was only indirectly instrumental in bringing about the acquisition,[12] the

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[1] See *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrula Garu* (1901), 28 I. A. 81; 24 Mad. 387; 5 C. W. N. 545; 3 Bom. L. R. 303.

[2] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; 9 Bom. L. R. 597; *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1870), 13 M. I. A. 542; 15 W. R. P. C. 10; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017; *Subbayya* v. *Surayya* (1887), 10 Mad. 251 (a case of waste land brought under cultivation); *Ajodhya Purshad* v. *Mahadeo Purshad* (1909), 14 C. W. N. 221; *Kristnappa Chetty* v. *Ramasawmy Iyer* (1875), 8 Mad. H. C. 25; *Ramasheshaiya Panday* v. *Bhagavat Panday* (1868), 4 Mad. H. C. 5; *Booniadi Lall (Bukshee)* v. *Dewkee Nundun Lall (Bukshee)* (1873), 19 W. R. C. R. 223; *Kalee Sunkar Bhadooree* v. *Eshan Chunder Bhadooree* (1872), 17 W. R. C. R. 528; *Bona Kooree (Mussamut)* v. *Boolee Singh (Baboo)* (1867), 8 W. R. C. R. 182; *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R. 256; *Purtab Bahaudur Sing* v. *Tilukdharee Sing* (1807), 1 Ben. Sel. R. 179 (new edition, 236).

[3] *Sheopersad Sing* v. *Kullunder Sing* (1803), 1 Ben. Sel. R. 76 (new ed. 101).

[4] *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 71.

[5] *Ramanna* v. *Venkata* (1888), 11 Mad. 246.

[6] *Krishnasami Ayyangar* v. *Rajagopola Ayyangar* (1894), 18 Mad. 73, at p. 83. See *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508; 1 C. L. R. 343.

[7] See *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508, at p. 510; 1 C. L. R. 343, at p. 345.

[8] See *In the goods of Pokurmull Augurwallah* (1896), 23 Calc. 980; 1 C. W. N. 31.

[9] *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1870), 13 M. I. A. 542, at p. 547; 6 B. L. R. 232, at p. 241; 15 W. R. P. C. 10, at p. 11; *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317; 19 W. R. C. R. 356.

[10] See *post*, pp. 254, 255.

[11] See *Rampershad Tewarry* v. *Sheo Churn Doss* (1866), 10 M. I. A. 490, at p. 505; *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (1889), 13 Bom. 534, at p. 545.

[12] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 558, 559; *Jadumani Dasi (Srimati)* v. *Gangadhar Seal*, Boul. 600; "Vyavastha Darpana," 2nd ed., p. 525; *Gooroo Churn* v. *Goluckmoney* (1843), Fulton, 165, at p. 181; *Meenatchee* v. *Chedumbra*, Mad. Dec. of 1853, p. 61.

acquirer is entitled to treat the acquisition as separate (see *post*, pp. 248, 249).

"It seems agreed that maintenance in the family, during the period of separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental." [1]

It has been held that property acquired by a coparcener while drawing an income from coparcenary property is joint.[2]

As to property purchased from money acquired by the exercise of a profession, see *post*, p. 250.

Where with comparatively small aid from the coparcenary property the separate acquisition of a distinct property is made by an individual member by his own labour or capital, the acquirer, according to the Bengal authorities, is entitled to a double share on partition,[3] no such share being given in case of the common stock being only improved or augmented.[4] Increased share.

It has been suggested [5] that the extra share allotted to the acquirer may be treated by him as self-acquired.

Whether this limitation will be accepted by the Judicial Committee or will be adopted in the other Provinces may be open to question.

Mr. Mayne [6] says that the text of Vasishta,[7] on which it is founded, "probably applied originally to self-acquisition properly so called, and that it cut down the rights of a self-acquirer, instead of enlarging the rights of one who has made use of common property. The Smriti Chandrika

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[1] Strange's "Hindu Law," i. 214.

[2] *Rameshaiya Panday* v. *Bhagavat Panday* (1868), 4 Mad. H. C. 5. See *post*, p. 250.

[3] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 64; *Sree Narain Berah* v. *Gooro Pershad Berah* (1866), 6 W. R. C. R. 219; *Lal Chand Shaw* v. *Swarnamoye Dasi* (1909), 13 C. W. N. 1133; *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (judgment of Supreme Court, 1855), 6 M. I. A. 526, at p. 539; *Golab Chand* v. *Goluk Monee Dossee* (1843), Fulton, 165; *Jadumani* v. *Gangadhar Seal*, Boul. 600; "Vyavastha Darpana" (2nd ed.), 521; *Gudadhur Serma* v. *Ajodhearam Chowdry* (1794), 1 Ben. Sel. R. 8 (new ed. 7); *Koshul Chukurwutty* v. *Radhanath Chukurwutty* (1811), 1 Ben. Sel. R. 336 (new ed. 448); *Purtab Bahaudur Sing* v. *Tilukharee Sing* (1807), 1 Ben. Sel. R. 179 (new ed. 236); *Kripa Sindhu Patjoshi* v. *Kanhaya Acharya* (1833), 5 Ben. Sel. R. 335 (new ed. 393); "Mitakshara," chap. i. s. 4, para. 29; "Dayabhaga," chap. ii. para. 41; chap. vi. s. 1, paras. 14, 28. See *ante*, p. 246.

[4] "Mitakshara," chap. i. s. 4, paras. 30, 31.

[5] Bhattacharya's "Hindu Law," 2nd ed., p. 228. It cannot be said to have been acquired without detriment to the paternal estate: *ante*, p. 243.

[6] "Hindu Law," 8th ed., pp. 367, 368.

[7] "And if one of the brothers has gained something by his own effort, he shall receive a double share," "Vasishta," xvii. 51; "Mitakshara," chap. i. s. 4, para. 29; "Dayabhaga," chap. vi. s. 1, paras. 27–29.

and Madhaviya both restrict the text to the gains of learning, when considered to be partible in consequence of the education from which they sprung having been imparted at the expense of the family.[1] The general principles laid down by Vijnanesvara seem to exclude the idea that any special and exclusive benefit can be obtained to any co-heir by a use of the family property.[2] Mr. W. Macnaghten states that under Benares law no such benefit can be obtained, whatever may have been the personal exertions of any individuals, but that the rule did not exist in Bengal." [3]

As the "Mitakshara" (chap. i. s. 5, para. 29) also accepts Vasishta's text the same rule as that applied in Bengal would apparently apply to all cases governed by the "Mitakshara."

Under the Bengal school of law, where the father and son are living together as a joint family, the father takes a double share in acquisitions made by a son; if they have been made by the use of joint funds the father and the acquirer take two shares each, and the rest of the brothers one share each; but if made without the use of joint funds the acquisitions are divided half and half between the father and the son. A father claiming a share of property acquired by his son is not bound to allow the son any share of the ancestral property in his hands.[4]

This rule has no application when the son has separated from his father.[5]

Coparcenary as regards some coparceners only.

Property may be coparcenary as regards some members of a joint family, while other members of the family, although coparceners in the family property, have no share therein.[6] Thus, if a coparcener dies leaving separate property, such property becomes the coparcenary property of his descendants, but his collateral coparceners have no interest therein.[7]

Endowed property.

The coparcenary may also be trustees of property devoted to religious or pious uses.[8] This class of property is incapable of partition.[9]

SEPARATE PROPERTY.

Separate property.

It is competent to a member of a joint family to acquire property for himself independently of his coparceners. Such

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[1] "Smriti Chandrika," chap. vii. para. 9, and see futwah in 2 William Macnaghten, 167.

[2] "Mitakshara," chap. i. s. 4, paras. 1–6.

[3] 1 Wm. Macnaghten, 52; 2 Wm. Macn. 7 n., 158, 160 n., 162 n.

[4] *Wooma Sooonduree Dossee* v. *Dwarka Nath Roy* (1868), 11 W. R. C. R. 72; *Dharma Das Kundu* v. *Amulyadhan Kundu* (1906), 33 Calc. 1119, at p. 1126; 10 C. W. N. 765. In the latter case reliance was placed on the case of *Sreenarain Berah* v. *Gooro Pershad Berah* (1866), 6 W. R. C. R. 219, but the question of the father's right did not arise in that case. Macnaghten's "Hindu Law," vol. ii. pp. 163, 164; Sircar's "Vyavastha Darpana," 2nd ed., pp. 447–456; "Dayabhaga," chap. ii. para. 71.

[5] See *Anund Mohun Paul Chowdhry* v. *Shamasoondery* (*Sreemutty*), W. R. 1864, C. R. 352.

[6] See *Shamnarain* v. *Court of Wards* (1873), 20 W. R. C. R. 197.

[7] See *ante*, p. 242.

[8] See *Ramchandra Panda* v. *Ram Krishna Mahapatra* (1906), 33 Calc. 507.

[9] See *post*, pp. 342, 343.

separate acquisitions can be dealt with at the pleasure of the acquirer.[1] In default of a will they pass to the heir of the acquirer,[2] who will, in cases under the Mitakshara law, if he be a son, take them as coparcenary property.[3]

This applies to Nambudri Brahmins.[4]

As to separate property of a member of a *tarwad*, see *Krishnan Nair* v. *Damodaran Nair* (1912), 38 Mad. 48, distinguishing *Govindan Nair* v. *Sankaran Nair* (1909), 32 Mad. 351, and overruling *Ammanga* v. *Uppadorai Patter* (1911), 34 Mad. 387.

As to the power of a father to divide his self-acquired property unequally amongst his sons, see *post*, p. 338.

Property acquired in the following ways is the absolute property of the acquirer. Other members of the family have no interest therein.[5]

(*a*) Property acquired by an individual member of the joint family by his own exertions,[6] or from his separate capital, or on his own credit,[7] without any help from, or detriment to, the Separate acquisitions.

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[1] *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at pp. 578, 580; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Sital* v. *Madho* (1877), 1 All. 394; *Narottam Jagjivan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. A. C. J. 6; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (1871), 8 Bom. H. C. O. C. 196; *Bishen Perkash Narain Singh* (*Raja*) v. *Bawa Misser* (1873), 12 B. L. R. 430; 20 W. R. C. R. 137; S. C. in Court below, 10 W. R. C. R. 287; *Nana Narain Rao* v. *Huree Punth Bhao* (1862), 9 M. I. A. 96; Marsh. 436; *Nagalingam Pillai* v. *Ramachandra Tevar* (1901), 24 Mad. 429; *Rameshwar Prosad* v. *Lachmi Prosad Singh* (1903), 7 C. W. N. 688; *Gunnaiyan* v. *Kamakchi Ayyar* (1902), 26 Mad. 339, at p. 353; *Subbayya* v. *Surayya* (1887), 10 Mad. 251; *Gangabai* v. *Vamanaji* (1864), 2 Bom. H. C. (2nd ed.) 301. See *Hanmantapa* v. *Jivubai* (1900), 24 Bom. 547; 2 Bom. L. R. 478.

[2] *Katama Natchiar* v. *The Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 613; 9 W. R. P. C. 31, at p. 39; *Balwant Singh* (*Rao*) v. *Kishori* (*Rani*) (1898), 25 I. A. 54; 20 All. 267; 2 C. W. N. 273.

[3] *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438, at p. 450; *Ram Narain Singh* (*Rajah*) v. *Pertum Singh* (1873), 11 B. L. R. 397, at p. 404; 20 W. R. C. R. 189, at p. 191. *Ante*, pp. 241, 242.

[4] *Vishnu Nambudri* v. *Akkamma* (1910), 34 Mad. 496.

[5] See *Yamunabai* v. *Manubai* (1899), 23 Bom. 608, at p. 611; 1 Bom. L. R. 95. As to the Bengal school, see *ante*, p. 224.

[6] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Somasundara Mudaliar* v. *Ganga Bissen Soni* (1904), 28 Mad. 386 (income derived from Government service). This would not include exertions as manager, *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61, at p. 64. As to earnings by a prostitute, see *Chandrareka* v. *Secretary of State* (1890), 14 Mad. 163; *Boologam* v. *Swornam* (1881), 4 Mad. 330.

[7] *Nursingh Dass* (*Rai*) v. *Narain Dass* (*Rai*) (1871), 3 N. W. P. H. C. 217, at p. 235. As to a policy of insurance, see *Rajamma* v. *Ramakrishnayya* (1905), 29 Mad. 121.

coparcenary property,[1] although he may have been maintained out of the proceeds of the family property.[2]

Property may be acquired by members of a joint family acting as partners without aid from the family property.[3]

(*b*) Property acquired as "gains of science,"[4] *i.e.* by the practice of a (learned) profession or occupation, where the property of the family has not been used for acquiring such property, or in the special education, which was necessary for the purpose of practising such profession.[5]

A mere general education or maintenance, even during the time of the acquisition,[6] at the expense of the family, would not, apparently, make the profits of the profession coparcenary property,[7] but a special education for the particular profession would stand upon a different footing.

The "gains of science" enumerated in the "Dayabhaya" (chap. vi, s. 2, paras. 2–12, are as follows :—

1. Prize for the solution of a difficulty.
2. Fee for instructing a pupil.

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[1] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Soobuns Lal* v. *Hurbuns Lal* (1805), 1 Ben. Sel. R. 91 (new ed. 121); *Purtab Bahaudur Sing* v. *Tilukdharee Sing* (1807), 1 Ben. Sel. R. 179 (new ed. 236); *Koul Nath Singh* v. *Jagrup Singh* (1830), 5 Ben. Sel. R. 12 (new ed. 14).

[2] See *Chabildas Lallubhai* v. *Ramdas Chabildas* (1909), 11 Bom. L. R. 606.

[3] See *Joharmal Ladhooram* v. *Chetram Harising* (1914), 39 Bom. 715; 17 Bom. L. R. 293. See *ante*, p. 239.

[4] "Manu," chap. ix. para. 206; "Narada Smriti," chap. ix. para. 6. The word which was translated by Colebrooke as "gains of science" is said to be literally "learning money," and to have meant money acquired by the teaching of the Vedas, K. K. Bhattacharya's "Joint Hindu Family," pp. 661–667.

[5] See cases in note 6 below.

[6] Strange's "Hindu Law," i. 214, 215; "Dayabhaga," chap. vi. s. 1, paras. 44–50. See *Durvasula Gangadharudu* v. *Durvasula Narasammah* (1872), 7 Mad. H. C. 47, at p. 49; *Chalakonda Alasani* v. *Chalakonda Ratnachalam* (1864), 2 Mad. H. C. 56, at p. 76; *Chellaperoomall* v. *Verraperoomall*, 4 Mad. Jur. 54, 240, referred to in Mayne's "Hindu Law," 8th ed., p. 361.

[7] *Durga Dat Joshi* v. *Ganesh Dat Joshi* (1910), 32 All. 305 (earnings as astrologer); *Laksman Mayaram* v. *Jamnabai* (1882), 6 Bom. 225 (earnings in Government employment); *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan* (1890), 15 Bom. 32 (earning as *Karkun* [agent in financial or revenue collections]); *Dhunookdharee Lall* v. *Gunput Lall* (1868), 11 B. L. R. 201 note; 10 W. R. C. R. 122; *Valloo Chetty (Pauliem)* v. *Sooryah Chetty (Pauliem)* (1877), 4 I. A. 109, at pp. 117, 118; 1 Mad. 252, at pp. 261, 262; *Lachmin Kuar* v. *Debi Prasad* (1897), 20 All. 435 (a case of money earned as a commissariat officer); *Boologam* v. *Swornam* (1881), 4 Mad. 330 (where it was attempted to treat the earnings of a dancing-girl as joint property); *Manchha (Bai)* v. *Narotam Das*, (1868), 6 Bom. H. C. A. C. 1 (earnings as vakil); see *Durvasula Gangadharadu* v. *Durvasula Narasammah* (1872), 7 Mad. H. C. 47; *Avayambal* v. *Kamalambal*, 19 M. L. J. 65.

3. Fee for officiating at religious rites.
4. Solving a question relating to science.
5. Deciding a litigated question.
6. Reward for the display of science.
7. Prize gained in a disputation.
8. Prize for reading.
9. Gain of a skilled artist.
10. Stake won by skill in play.

(*c*) Gifts on marriage[1] or on other occasions,[2] and bequests. Gifts and bequests.

The payment of the marriage expenses out of coparcenary property does not render the marriage gifts joint property.[3]

As to *babuana* grants of ancestral property, see *post*, p. 268.

As to gifts and bequests to a son in cases governed by the Mitakshara school of law, see *ante*, p. 244.

As to gifts and bequests to the joint family, see *ante*, p. 240.

(*d*) Grants of property made by Government,[4] whether to a stranger or to a kinsman of a former owner of the land, unless it appears from the grant that it was to enure for the benefit of the family,[5] or where the grantee has constituted himself a Grants by Government.

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[1] *Adhar Chandra Chatterjee* v. *Nobin Chandra Chatterjee* (1907), 12 C. W. N. 103; *Beharee Lall Roy* v. *Lall Chunder Roy* (1876), 25 W. R. C. R. 307.

[2] See "Mitakshara," chap. i. s 4, para. 2. "Manu" (chap. ix. para. 206) includes gifts presented as a mark of respect to a guest; "Narada" (chap. xiii. paras. 6, 7) includes gifts by father and mother. *Krishnaswami Naidu* v. *Seethalakshmi Ammal* (1915), 39 Mad. 1029 (gift for maintenance).

[3] *Sheo Gobind* v. *Sham Narain Singh* (1875), 7 N. W. P. 75.

[4] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 610; 2 W. R. P. C. 31, at p. 38; *Beer Pertab Sahee (Baboo)* v. *Rajender Pertab Sahee (Maharajah)* (1867), 12 M. I. A. 1, at p. 34; 9 W. R. P. C. 15, at p. 21. See *Raja Jee Bahadur Garu (Raja)* v. *Parthasaradhi Appa Row* (1902), 30 I. A. 14; 26 Mad. 202; 8 C. W. N. 105. See *Sookraj Koowar (Mussumat Thukrain)* v. *Government* (1871), 14 M. I. A. 112; *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Brij Indar Bahadur Singh* v. *Janki Koer (Ranee)* (1877), 5 I. A. 1; *Shere Bahadur Singh (Thakur)* v. *Dariao Kuar (Thakurain)* (1877), 3 Calc. 645. See *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Ram Nundun Singh* v. *Janki Koer (Maharani)* (1902), 29 I. A. 178, at p. 193; 29 Calc. 828, at p. 851; 7 C. W. N. 57, at p. 72; 4 Bom. L. R. 664. As to a sale by Government of property which had been claimed as an escheat, see *Mallan* v. *Purushothama* (1889), 12 Mad. 287. As to the enfranchisement of an inam, see *Gunnaiyan* v. *Kamakchi Ayyar* (1902), 26 Mad. 339, and cases there cited; *Subbaraya Mudali* v. *Kamu Chetti* (1899), 23 Mad. 47.

[5] *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55; *Govind Rao (Sri Mahant)* v. *Sita Ram Kesho* (1898), 25 I. A. 195; 21 All. 53; 2 C. W. N. 681. As where the grant merely operated as an ascertainment of the claim for revenue, and a release of the reversionary right of the Crown, *Narayana* v. *Chengalamma* (1886), 10 Mad. 1. See *Radhabai* v. *Nanarav* (1879), 3 Bom. 151.

trustee for the family,[1] or where there has been a family arrangement,[2] or apparently where a family custom has treated them as joint.[3]

The quality of the estate in regard to its descendibility would not, *primâ facie*, be altered by the regrant.[4]

It was held in *Baijnath Prasad Singh* v. *Tej Bali Singh* (1916), 38 All. 590, that where an impartible estate is lost to a certain family and on the representation of a member of that family the Government makes a grant in his favour without any special term or condition, the property is joint family property in the hands of the member of the family to whom the grant is made.

Recovery of lost property.

(*e*) Coparcenary property which had been lost to the family,[5] otherwise than by voluntary and valid alienation,[6] but recovered by an individual member without the aid of the family property[7] from a stranger holding adversely to the family.[8]

There must have been an express or implied abandonment of their rights by the coparceners, and the coparceners must have been in a position to sue.[9]

Where the property recovered under these conditions consists of land,[10] the recoverer, except perhaps he be the father,

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[1] See *Hardeo Bux* (*Thakoor*) v. *Jawahir Singh* (*Thakoor*) (1877), 4 I. A. 178; 3 Calc. 522; 6 I. A. 161; *Sookraj Koowar* (*Mussumat Thukrain*) v. *Government* (1871), 14 M. I. A. 112; *Shere Bahadur Singh* (*Thakur*) v. *Dariao Kuar* (*Thakurain*) (1877), 3 Calc. 645; *Ramanund Koer* (*Thakurain*) v. *Raghunath Koer* (*Thakurain*) (1881), 9 I. A. 41; 8 Calc. 769

[2] See *Kedar Nath* (*Maharaj*) v. *Ratan Singh* (*Thakur*) (1910), 37 I. A. 161; 32 All. 415; 14 C. W. N. 985; 12 Bom. L. R. 656.

[3] See *Madharav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519.

[4] See *Venkata Narasimha Appa Row* (*Sri Rajah*) v. *Rangayya Appa Row* (*Sri Rajah*) (1905), 29 Mad. 437.

[5] This does not apply to a case where the property was held by a person claiming to be a member of the family, *Bissessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty* (1868), 9 W. R. C. R. 69; S. C. 8 W. R. C. R. 13.

[6] *Bajaba* v. *Trimbak Vishvanath* (1909), 34 Bom. 106; 11 Bom. L. R. 1122.

[7] "Yajnavalkya," bk. ii. v. 119; "Mitakshara," chap. i. s. 5, para. 11; "Manu," chap. ix. para. 209; *Bolakee Sahoo* v. *Court of Wards* (1870), 14 W. R. C. R. 34; *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259.

[8] *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259.

[9] *Ibid.*; *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150; *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1886), 10 Bom. 528, at p. 551; *Shamnarain Singh* v. *Rughooburdyal* (1877), 3 Calc. 508, at p. 511; 1 C. L. R. 343, at pp. 345, 346. See also *Bissessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty* (1868), 9 W. R. C. R. 69; S. C. (1867), 8 W. R. C. R. 13.

[10] K. K. Bhattacharya ("Law Relating to the Joint Hindu Family," p. 661) considers that this distinction only applies to arable land.

is not entitled to the property absolutely, but he is entitled on partition to take one-fourth share as a reward for the recovery, and he has to share the remainder with his brethren.[1]

Where the recoverer is the father, the Mitakshara would apparently give him the whole of the property,[2] but the authorities of the Bengal school make no distinction between a recovery by the father or one by another coparcener.[3]

The redemption of property is not a recovery within the meaning of this rule.[4]

The use of family money for the purpose of recovering such property does not necessarily make it joint.[5]

(*f*) In a case governed by the Mitakshara school of law, property inherited by obstructed inheritance (*Sapratibandha*),[6] *i.e.* from some person other than a natural or adopted father, father's father, or father's father's father.[7] Obstructed heritage.

Property inherited by a single son from his mother would apparently not be coparcenary property, but the question is by no means clear.

As to property inherited by several sons, see *ante*, pp. 238–241.

As pointed out by Mr. J. C. Ghose,[8] according to the *Smritis* it is only in property derived from a paternal grandfather that the sons have

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[1] "Mitakshara," chap. i. s. 4, para. 3; Colebrooke's "Digest," vol. iii. p. 365; "Daya-Krama Sangraha," chap. iv. s. 2, para. 9. See *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1881), 4 Mad. 250, at p. 259. Where the property is impartible, the recoverer would apparently be entitled to a reward. *Ibid.*, pp. 259, 260.

[2] Chap. i. s. 5, para. 11.

[3] "Dayabhaga," chap. vi. s. 2, paras. 36–39; "Daya-Krama Sangraha," chap. iv. s. 2, paras. 7, 8; William Macnaghten, vol. i. 52; vol. ii. 157. In *Bolakee Sahoo* v. *Court of Wards* (1870), 14 W. R. C. R. 34, the right of the father to the whole was maintained, but the question as to his being entitled only to an extra share does not seem to have been raised.

[4] *Visalatchi Ammal* v. *Annasamy Sastry* (1870), 5 Mad. H. C. 150.

[5] *Bachcho Kuwar* v. *Dharam Das* (1906), 28 All. 347.

[6] *Ante*, p. 241, note 10.

[7] *Atar Singh* v. *Thakar Singh* (1908), 25 I. A. 206; 35 Calc. 1039; 12 C. W. N. 1049; 10 Bom. L. R. 790; *Gurumurthi Reddi* v. *Gurammal* (1908), 32 Mad. 88; *Timannacharya* v. *Balacharya* (1903), 4 Bom. L. R. 457; *Nund Coomar Lall (Baboo)* v. *Razeeoddeen Hossein* (1872), 10 B. L. R. 183; 18 W. R. C. R. 477; *Nallatambi Chetti (Rayadur)* v. *Mukunda Chetti (Rayadur)* (1868), 3 Mad. H. C. 455; *Saminadha Pillai* v. *Thangathanni* (1895), 19 Mad. 70; *Lochun Singh* v. *Nemdharee Singh* (1873), 20 W. R. C. R. 170; *Pitam Singh* v. *Ujagar Singh* (1878), 1 All. 651; *Jawahir Singh* v. *Guyan Singh* (1868), 3 Agra H. C. 78. See Ghose's "Hindu Law," 2nd ed., pp. 375, 376.

[8] "Hindu Law," 2nd ed., p. 375, see "Mitakshara," chap. i. s. 4; and *Karuppai Nachiar* v. *Sankanarayam Chetty* (1903), 27 Mad. 300, at p. 307.

equal rights with the father, but according to Mr. Colebrooke, the Mitakshara includes as coparcenary property everything obtained to the detriment of the mother's estate.[1]

In *Karuppai Nachiar* v. *Sankanarayan Chetty* (1903), 27 Mad. 300, the Madras High Court, and in *Parson (Bai)* v. *Somli (Bai)* (1912), 36 Bom. 424; 14 Bom. L. R. 400, the Bombay High Court, held that sons inheriting from a mother took as tenants in common, but this is, it is submitted, not in accordance with the views of the Judicial Committee in *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayamma (Raja Chelikani)*, 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1; 4 Bom. L. R. 657, *ante*, pp. 238, 239.

As to property inherited from a maternal grandfather, see *ante*, pp. 241, 242.

Under the Bengal school, inherited property, from whomsoever it be inherited, is the separate property of a male heir.

Accretions and proceeds.

(*g*) Accretions to separate property of any kind and savings therefrom, and property purchased with the income thereof, or from the proceeds thereof.[2]

Burden of proof that property separate.

A member of a joint family claiming property as separate must show of what the separate property consists,[3] and that it was his separate acquisition.[4]

As to the presumption with regard to the family being joint, see *ante*, pp. 220–223.

Property in name of coparcener.

Property [5] purchased, either at a private sale or at a sale in execution of a decree of a Civil Court,[6] or held by or in the name of, or settled with [7] a coparcener in a family which is joint in estate,[8] is, if held in a manner not inconsistent with the property being joint, presumed, apart from special circumstances, to have belonged to the coparcenary at the time of its acquisition.[9]

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[1] See *ante*, p. 243.

[2] See *Booniadi Lall (Bukshee)* v. *Dewkee Nundun Lall (Bukshee)* (1873), 19 W. R. C. R. 223.

[3] *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. J. 169.

[4] *Bipro Prosad Mytee* v. *Kenae Doyee* (1865), 3 W. R. C. R. 165; S. C. on remand, 5 W. R. C. R. 82.

[5] This includes money due on a bond, *Kalee Sunkur Bhadooree* v. *Eshan Chunder Bhadooree* (1872), 17 W. R. C. R. 528.

[6] *Hari Singh* v. *Sher Sing* (1909), 31 All. 282.

[7] *Huro Soonduree Debia* v. *Doorga Doss Bhuttacharjee* (1871), 16 W. R. C. R. 265.

[8] They may have separated in food or worship, *ante*, p. 221.

[9] *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (1843), 3 M. I. A. 229, at p. 240; 6 W. R. P. C. 43, at p. 44; *Prankishen Paul Chowdhry* v. *Mothooramohun Paul Chowdhry* (1865), 10 M. I. A. 403; 5 W. R. P. C. 11; *Bissessur Lall Sahoo* v. *Luchmessur Singh (Maharajah)* (1879), 6 I. A. 233, at p. 236; 5 C. L. R. 477, at p. 479; *Cheetha (Mussumat)* v. *Miheen Lal (Baboo)* (1867), 11 M. I. A. 369; *Luximan Row Sadasow* v. *Mullar Row Bajee* (1831), 2 Knapp. 60; 5 W. R. P. C. 67; *Parbati Dasi* v. *Baikuntha Nath De (Raja)* (1913), 18 C. W. N. 428; 16 Bom. L. R. 101;

There is no similar presumption in the case of property purchased by or in the name of dependent members of the family, who have no vested interest in the joint family, as, for instance, a son-in-law living in the house,[1] a wife,[2] under the Bengal school of law a son when the father is alive,[3] or a female member of the family;[4] but where the property had been purchased by the managing members in such name the presumption might arise.[5] Dependent members.

"In the case of an ordinary Hindu family who are living together, or have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it." [6]

"The fact of the Hindu family is enough to put the purchaser upon

Kanhia Lal v. *Debi Das* (1899), 22 All. 141; *Yanumula Venkayama* (*Stree Rajah*) v. *Yanumula Boochia Vankondora* (*Stree Rajah*) (1870), 13 M. I. A. 333; 13 W. R. P. C. 4; *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1873), 12 B. L. R. 317, at p. 327; 19 W. R. C. R. 356, at p. 357; *Prannath Chowdhry* v. *Kashinath Roy Chowdhry*, W. R. 1864, C. R. 169; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489; *Jugodumba Debia* v. *Rohinee Debia* (1875), 23 W. R. C. R. 422; *Heera Lall Roy* v. *Bidyadhur Roy* (1874), 21 W. R. C. R. 343; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280, at p. 309; *Annundo Mohun Roy* v. *Lamb* (1862), Marsh. 169; 1 Hay, 374; *Hait Singh* v. *Dabee Singh* (1870), 2 N. W. P. 308; *Nursingh Dass* (*Rai*) v. *Narain Dass* (*Rai*) (1871), 3 N. W. P. 217; S. C. on appeal (1876), 26 W. R. C. R. 17; *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1854), 6 M. I. A. 53; *Subbayya* v. *Surayya* (1887), 10 Mad. 251; *Subbayya* v. *Chellamma* (1886), 9 Mad. 477 (where waste lands were brought under cultivation); *Gopee Lall* v. *Bhugwan Doss* (*Mohunt*) (1869), 12 W. R. C. R. 7; *Narayan Deshpande* v. *Anaji Deshpande* (1880), 5 Bom. 130; *Nilmoney Bhooya* v. *Gunga Narain Shahur Roy* (1864), 1 W. R. C. R. 334. See *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922; *Shib Pershad Chuckerbutty* v. *Gunga Monee Debee* (1871), 16 W. R. C. R. 291; *Deela Singh* v. *Toofanee Singh* (1864), 1 W. R. C. R. 306; *Beharee Lal* (*Lalla*) v. *Modho Pershad* (*Lalla*) (1866), 6 W. R. C. R. 69.

[1] *Dossee Monee Dossee* v. *Ram Chand Mohur* (1867), 7 W. R. C. R. 249.

[2] *Chowdrani* v. *Tariny Kanth Lahiri Chowdry* (1882), 8 Calc. 545. This decision was reversed on the facts, *Dharani Kani Lahiri* v. *Kristokumari Chowdhrani* (1886), 13 I. A. 70; 13 Calc. 181. See *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (1866), 6 W. R. C. R. 312.

[3] *Sarada Prosad Ray* v. *Mahananda Ray* (1904), 31 Calc. 448.

[4] *Narayana* v. *Krishna* (1884), 8 Mad. 214.

[5] See *Chand Hurree Maitee* v. *Norendro Narain Roy* (*Rajah*) (1873), 19 W. R. C. R. 231. The purchase was made by the managing member in the name of the family priest.

[6] *Bannoo* v. *Kashee Ram* (1877), 3 Calc. 315, at p. 317; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436. This presumption applies also to the case where the property has passed by sale into the hands of third parties and has been redeemed by private purchase by a coparcener; *Gooroo Pershad Roy* v. *Debee Pershad Tewaree* (1866), 6 W. R. C. R. 58.

inquiry, and if he deals with a single member without obtaining proof that the property is separate property he does so at his own risk." [1]

Proof of nucleus.

There has been some conflict as to whether it is necessary for the person claiming the property as joint to prove that there was a nucleus of family property from which the property in question might have been acquired, or whether mere proof that the acquirer was at the time of the acquisition a member of a Hindu family is not sufficient.[2] Mr. Mayne [3] seeks to reconcile these decisions by pointing out how the burden of proof varies in accordance with the nature of the claim to separate property.

In a recent case the Allahabad High Court [4] has laid down that in Mitakshara cases proof of nucleus is necessary, but that none is necessary in cases governed by the Dayabhaga. The judges relied on the decision in *Sarada Prosad Ray* v. *Mahananda Ray* (1904), 31 Calc. 448, but in that case, which was governed by the Bengal school, the property was acquired during the lifetime of the father, and therefore there was no presumption that the property was joint.[5]

It is obvious that there may be joint property without a pre-existing nucleus.[6]

It is difficult, if not impossible, to lay down a rule which will suit the circumstances of each case, but every weight must be given to the practice of sharing property in common as members of a joint family which prevails among Hindus. It rarely happens that a case depends upon the mere necessity to prove the existence of a nucleus of family property.

When it is proved that there was family property, the fruits of which were capable of providing for the acquisition of the property in question,

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[1] *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38.

[2] The following cases assert that it is unnecessary to prove a nucleus: *Taruck Chunder Poddar* v. *Jodeshur Chunder Koondoo* (1873), 11 B. L. R. 193; 19 W. R. C. R. 178; *Gobind Chunder Mookerjee* v. *Doorgapersad Baboo* (1874), 14 B. L. R. 337; 22 W. R. C. R. 248; *Shushee Mohun Pal Chowdhry* v. *Aukhil Chunder Banerjee* (1876), 25 W. R. C. R. 232; *Vedavalli* v. *Narayana* (1877), 2 Mad. 19; *Tara Churn Mookerjee* v. *Joynarain Mookerjee* (1867), 8 W. R. C. R. 226. In the following cases a different view was entertained: *Dwarkaprasad* v. *Jamnadas* (1910), 13 Bom. L. R. 133; *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65; *Denonath Shaw* v. *Hurrynarain Shaw* (1873), 12 B. L. R. 349; *Kristo Chunder Kurmokar* v. *Rughoonath Kurmokar* (1873), 12 B. L. R. 352, note; *Hurish Chunder Doss* v. *Gouree Pershad Chatterjee* (1871), 16 W. R. C. R. 162; *Khilut Chunder Ghose* v. *Koonj Lall Dhur* (1868), 11 B. L. R. 194, note; 10 W. R. C. R. 333; *Radhika Prasad Dey* v. *Dharma Dasi Debi* (*Mussumat*) (1869), 3 B. L. R. A. C. 124; 11 W. R. C. R. 499. See *Pran Kristo Mojoomdar* v. *Bhageerutee Gooptia* (*Sreemutty*) (1873), 20 W. R. C. R. 158; *Chundro Tara Deba* v. *Buksh Ali* (1869), 11 W. R. C. R. 305; *Hurish Chunder Mookerjee* v. *Mokhoda Debia* (1872), 17 W. R. C. R. 564; *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436, at p. 438.

[3] "Hindu Law," 8th ed., pp. 373, 374.

[4] *Govind Chandra Das* v. *Radha Kristo Das* (1909), 31 All. 477. See also *Ram Kishen Das* v. *Tunda Mal* (1911), 33 All. 677.

[5] *Ante*, pp. 218, 219.

[6] See *Karsondas Dharamsey* v. *Gangabai* (1908), 32 Bom. 479; 10 Bom. L. R. 184; *Laldas Narandas* v. *Motibai* (1908), 10 Bom. L. R. 175; *Haridas Lalji* v. *Narotham* (1911), 14 Bom. L. R. 237; *ante*, pp. 238 *et seq.*

it is clear that the burden is upon the person who alleges that the property was a separate acquisition.[1]

The absence of a nucleus may be a factor of considerable importance for the purpose of determining a question as to whether property was a separate acquisition.[2]

The fact that the property had increased during a long period to a considerable value from a small nucleus of family property is not sufficient to rebut the presumption that it was all family property.[3]

The doctrine of nucleus has no application to Khojas.[4]

Use of name of individual member.

The purchase of property in the name of one coparcener, or the use of his name in documents relating to the property,[5] or the carrying on of law suits by him alone,[6] or an entry of his name in revenue records,[7] does not by itself show that the acquisition was separate, or that there had been a separation, particularly where that member is the managing member of the family; [8] but where a purchaser from such member has been misled, the family may, in some cases, be estopped from claiming the property as joint,[9] and in conjunction with other evidence of separation, or of separate acquisition, such evidence may be of importance.[10]

Rebuttal of presumption.

The presumption may be rebutted by showing that the

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[1] *Lal Bahadur* v. *Kanhaia Lal* (1907), 34 I. A. 65; 29 All. 244; 11 C. W. N. 417; 9 Bom. L. R. 597; *Anandrao Gunputrao* v. *Vasantrao Madhavrao* (1907), 34 Mad. 262, note; 11 C. W. W. N. 478; 9 Bom. L. R. 595. See *Tara Churn Mookerjee* v. *Joynarain Mookerjee* (1867), 8 W. R. C. R. 226.

[2] *Bhagubai* v. *Tukaram* (1905), 7 Bom. L. R. 169.

[3] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228.

[4] *Jan Mahomed* v. *Datu Jaffar* (1913), 38 Bom. 449; 15 Bom. L. R. 1044.

[5] *Ante*, p. 254. *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (1843), 3 M. I. A. 229, at p. 240; 6 W. R. P. C. 43, at p. 44; *Parbati Dasi* v. *Baikuntha Nath De (Raja)* (1913), 18 C. W. N. 428; 16 Bom. L. R. 101; *Janokee Dassee* v. *Kisto Komul Singh* (1862), Marsh. 1; *Deela Singh* v. *Toofanee Singh* (1864), 1 W. R. C. R. 306; *Beharee Lal (Lalla)* v. *Modho Pershad (Lalla)* (1866), 6 W. R. C. R. 69; *Runjeet Singh* v. *Madud Ali* (1868), 3 Agra, 222; *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38; *Mun Mohinee Dabee* v. *Soodamonee Dabee* (1865), 3 W. R. C. R. 31. See *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (1870), 13 M. I. A. 542; 6 B. L. R. 232; 15 W. R. P. C. 10; *Vedavalli* v. *Narayana* (1877), 2 Mad. 19; *Kundan Lal* v. *Shankar Lal* (1913), 35 All. 564.

[6] *Deela Singh* v. *Toofanee Singh* (1865), 1 W. R. C. R. 306.

[7] *Jussoondah* v. *Ajodhia Pershad* (1867), 2 Ind. Jur. N. S. 261. See *Rewa Prasad Sukal* v. *Deo Dutt Ram Sukal* (1899), 27 I. A. 39; 2 Calc. 515; 4 C. W. N. 582.

[8] *Kishen Komul Singh* v. *Janokee Dossee* (1862), W. R. Sp. No. 3; 1 Ind. Jur. O. S. 23.

[9] See *Gour Chunder Biswas* v. *Greesh Chunder Biswas* (1867), 7 W. R. C. R. 120, at p. 122.

[10] See *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65; *Peary Lall* v. *Bhawoot Koer* (1862), W. R. Sp. No. 18.

property has been self-acquired from separate funds, without the aid of the coparcenary property, and that the property is held separately,[1] or by proof of separation before the acquisition, or by proof that at the time of acquisition there was no family property out of which it could have been acquired,[2] or by proof of separation after the purchase, and exclusive possession of the property thereafter,[3] or by proof of the assent of coparceners to the property being treated as separate.[4]

Evidence as to the source of the purchase-money is generally the most satisfactory mode of proof, but it is not indispensable.[5]

Where it is admitted or proved that property in dispute was not originally coparcenary property,[6] or was not acquired by use of coparcenary funds,[7] or that a partition has already taken place,[8] the burden lies upon the person alleging the property to be joint.

Originally a separate acquisition.

Where property was in its origin a separate acquisition of an individual member of the family, the burden of proving that it has become joint property, *i.e.* that its character has been changed by treatment,[9] is on the person making the assertion.[10]

Possession of property.

There is no presumption that a family possesses any particular property,[11] or any property at all.[12] A person who claims a

[1] *Lokenath Surma* v. *Ooma Moyee Dabee* (1864), 1 W. R. C. R. 107.

[2] See *Gunga Dhur Chatterjee* v. *Soorjo Nath Chatterjee* (1871), 15 W. R. C. R. 446.

[3] *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 65.

[4] See *Kallianji* v. *Bezonji*, 32 Bom. 512; 10 Bom. L. R. 754.

[5] See *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (*Mussumat*) (1843), 3 M. I. A. 229; 6 W. R. P. C. 43; *Dhunookdharee Lall* v. *Gunput Lall* (1868), 11 B. L. R. 201, note; 10 W. R. C. R. 122; *Bholanath Mahta* v. *Ajoodhia Persad Sookul* (1873), 12 B. L. R. 336; 20 W. R. C. R. 85.

[6] See *Atar Singh* v. *Thakar Singh* (1908), 35 I. A. 206; 35 Calc. 1039; 12 C. W. N. 1049; 10 Bom. L. R. 790.

[7] *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. J. 153, at pp. 176, 177.

[8] *Ram Ghulam Singh* v. *Ram Behari Singh* (1895), 18 All. 90; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. J. 153, at pp. 176, 177; *Ram Gobind Koond* v. *Hossein Ali* (*Moulvie Syud*) (1867), 7 W. R. C. R. 90; *Vinayak Narsinvh* v. *Datto Govind* (1900), 25 Bom. 367; *Prem Chund Dan* v. *Darimba Debia* (1871), 15 W. R. C. R. 238.

[9] *Ante*, p. 245.

[10] See *Venkataramanayamma Garu* (*Sri Raja Chelikani*) v. *Appa Rau Bahadur Garu* (1897), 20 Mad. 207, at p. 220. This decision was set aside on appeal (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1, but this dictum as to the burden of proof was untouched by the decision of the Judicial Committee.

[11] See *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237.

[12] *Toolseydas Ludha* v. *Premji Tricumdas* (1888), 13 Bom. 61, at p. 66;

share in property as belonging to a joint family, of which he is admitted or has been proved to be a member, must prove either that the property was held or acquired by the members of the family as such,[1] or that the person in whose possession it is is a member of the family.[2]

He may, of course, rebut evidence of self-acquisition by evidence as to the source of the acquisition, or by other evidence tending to show that the property was joint.

Impartible property.

There is in India a considerable quantity of immovable property which, although partible by nature, is by custom or by the terms of a grant by the Government, impartible, in the sense that it always descends to a single heir, and is not coparcenary property.

In Bengal, Behar, and Orissa,[3] except in the Jungle Mehals of Midnapore, and other districts where local customs [4] prevail,[5] impartible zemindaries are not recognized. This rule does not apply to a principality (*Raj*).[6]

"The nature of the estate and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence available in each case." [7] The burden of proof is upon the person alleging impartibility.[8]

Ramkishan Das v. *Tunda Mal* (1911), 33 All. 677. See *Nanabhai Ganpatrav Dhairyavan* v. *Achratbai* (1886), 12 Bom. 122, at p. 131.

[1] See *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922, at p. 931; *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (1882), 9 Calc. 237.

[2] Cases, *ante*, p. 255, note 6, and p. 257, note 5. A different view was entertained in *Shiu Golam Sing* v. *Baran Sing* (1868), 1 B. L. R. A. C. 164, at p. 167, where it was said, "He must, at least, show that the defendants whom he sues constitute a joint family, and that the property in question, became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family."

[3] Ben. Reg. XI. of 1793.

[4] Local custom does not include a family custom, see *Deedar Hossein (Rajah)* v. *Zahoor-on Nissa (Ranee)* (1841), 2 M. I. A. 441.

[5] Ben. Reg. X. of 1810.

[6] See *Beer Pertab Sahe (Baboo)* v. th *jender Pertab Sahee (Maharajah)* tal67), 12 M. I. A. 1; 9 W. R. P. C. *Gunesh Dutt Singh (Baboo)* v. *Moheshur Singh (Maharaja)* (1855), 6 M. I. A. 164.

[7] *Venkata Narasimha Appa Row (Sri Raja)* v. *Parthasarathy (Sri Raja)* (1913), 41 I. A. 51, at p. 61; 37 Mad. 199, at p. 210; 17 C. W. N. 1221, at p. 1224; 15 Bom. L. R. 1010, at p. 1014; *Mallikarjuna (Srimantu Raja Yarlagadda)* v. *Yarlagadda Durga (Srimantu Raja)* (1890), 17 I. A. 134; 13 Mad. 406; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261, at p. 269; 28 Mad. 508, at p. 515; 10 C. W. N. 95, at p. 106; 7 Bom. L. R. 907; *Durga Charan Mahto* v. *Raghunath Mahto* (1913), 18 C. W. N. 55.

[8] *Venkata Narasimha Appa Row (Sri Raja)* v. *Parthasarathy (Sri Raja)* (1913), 41 I. A. 51, at p. 61; 37 Mad. 199, at p. 209; 17 C. W. N. 1221, at p. 1224; 15 Bom. L. R. 1010,

Raj, palayam. In most cases such property is annexed to a *Raj*, or principality,[1] or to a *Palayam*, or to some other hereditary office; but a custom of descent according to the law of primogeniture may exist by *koláchár* or family custom, although the estate may not be a *raj* or *palayam*.[2]

A private individual cannot create an impartible estate,[3] or provide that it should always descend to a single heir.[4]

The following are instances where the custom of impartibility in the sense of the property being held by a single individual is to be found:—

Raj. (*a*) Zemindaries, especially in the Madras Presidency, partaking of the nature of a Raj or sovereignty.[5]

Palayam. (*b*) Palayams (tracts of country governed by a Poligar or petty chieftain as a principality or Raj) [6] in the Madras Presidency.[7]

An estate which is neither a Raj nor a Palayam may also by family custom be impartible.[8]

Grants by Government. (*c*) Saranjams [9] or Jaghirs.[10] Although Saranjams are *primâ facie* impartible, they may be originally partible, or become so by family usage.[11]

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at p. 1014; *Durga Charan Mahto* v. *Raghunath Mahto* (1913), 18 C. W. N. 55.

[1] A *Raj* "in its very nature excludes the idea of division" in the sense of partition among the sons: *Gunesh Dutt Singh* v. *Moheshur Singh (Maharajah)* (1855), 6 M. I. A. 164, at p. 187.

[2] *Chintamun Singh (Chowdhry)* v. *Nowlukho Konwari (Mussamut)* (1875), 2 I. A. 263; 1 Calc. 153; *Urjun Sing (Rawut)* v. *Ghunsiam Sing (Rawut)* (1851), 5 M. I. A. 1[illegible]. See *Shyamanand Das Mohapatra* v. *Ramakanta Das Mohapatra* (1904), 32 Calc. 6 (reversed on the facts on appeal, *Rama Kanta Das Mahapatra* v. *Shamanand Das (Choudhuri)* (1909), 36 I. A. 49; 36 Calc. 590; 13 C. W. N. 581; 11 Bom. L. R. 53); As to evidence of the custom of primogeniture, see *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459; 4 Bom. L. R. 372; *Rama Kanta Das Mahapatra* v. *Shamanand Das (Chowdhuri)* (1909), 36 I. A. 49; 36 Calc. 590; 13 C. W. N. 581; 11 Bom. L. R. 530; *Balvadru Samant Singh (Choudhury)* v. *Bimbadhur Roy* (1916), 1 Pat. L. J. 509; *ante*, p. 32.

[3] *Pirojshah* v. *Manibhai* (1911), 36 Bom. 53; 13 Bom. L. R. 963; *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1903), 31 Calc. 111; 7 C. W. N. 688; see *post*, pp. 533, 534.

[4] *Post*, p. 532.

[5] See *Gavuridevamma Garu (Sri Rajah Yenumala)* v. *Ramandora Garu (Sri Rajah Yenumala)* (1870), 6 Mad. H. C. 93, at p. 105. See cases in Norton L. C. pp. 478–480.

[6] See Wilson's "Glossary," p. 391.

[7] *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1861). 9 M. I. A. 66; 1 W. R. P. C. 30.

[8] *Chintamun Singh (Chowdhry)* v. *Nowlukho Konwari (Mussamut)* (1875), 2 I. A. 263; 1 Calc. 153; *Shyamanund Das Mohapatra* v. *Rama Kanta Das Mohapatra* (1904), 32 Calc. 6; *Urjun Sing (Rawut)* v. *Ghunsiam Sing (Rawut)* (1851), 5 M. I. A. 169.

[9] Grants generally of Revenue made by Maratha sovereigns, see Wilson's "Glossary," p. 465. *Narayan Jagannath Dikshit* v. *Vasudeo Vishnu Dikshit* (1890), 15 Bom. 247; *Ramchandra Mantri* v. *Venkatrao* (1882), 6 Bom. 598.

[10] Grants by the Sovereign, see *Raghojirao Saheb (Shrimant Raje Bahadur)* v. *Lakshmanrao Saheb (Shrimant Raje Bahadur)* (1912), 39 I. A. 202; 36 Bom. 639; 16 C. W. N. 1058; 14 Bom. L. R. 1226; *Nilmoni Singh (Rajah)* v. *Bakranath Singh* (1882), 9 I. A. 104; 9 Calc. 187; see *ante*, p. 251.

[11] *Madhavrav Manohar* v. *Atmaram Keshav* (1890), 15 Bom. 519. See *Gopal Hari* v. *Ramakant* (1896), 21 Bom. 458, at p. 460.

Grants by Government, at any rate in the Southern Mahratta country, in the absence of any provision in the grant, or any custom would follow the ordinary rule of ancestral property,[1] especially where they are granted for the maintenance of the family.[2] Sanads in common form under Mad. Reg. XXV. of 1802 do not alter the partibility of the property.[3] There is no presumption that grants to the holder of an office are impartible.[4]

Grants of *jaghirs* are *primâ facie* for life, but may be made heritable by appropriate words.[5]

As to the descent of jaghirs in the Punjab, see Act IV. (Punj. C.) of 1900.

It has been held that land held as appertaining to the office of *desai*, who was formerly the officer employed in the Mahratta country in superintending the collection of the Government revenues and other duties, is *primâ facie* partible.[6] *Desai.*

There is similar authority with regard to the office of *deshpande*, an hereditary revenue accountant of a district or a certain number of villages,[7] and to the office of *deshmukh*, who is a district Revenue officer.[8] *Deshpande. Deshmukh.*

On partition, however, the right of the officer to allowances for the performance of the duties of his office must be reserved.[9]

A mere arrangement for the convenient performance of the services of the officer is on a different footing from a custom.[10]

Where the services have been abolished, a family custom might still render the property impartible.[11]

The terms of the grant might, of course, create impartibility.[12]

The office of *Pattam*, an office of dignity in a family governed by the Aliya Satana law, is impartible.[13] *Pattam.*

(*d*) Service tenures, such as the *ghatwal*[14] tenures in Manbhoom and Service tenures.

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[1] *Bodhrao Hunmont* v. *Nursing Rao* (1856), 6 M. I. A. 426; *Panchanadayyan* v. *Nilakandayyan* (1883), 7 Mad. 191.

[2] *Visvanadha Naick* v. *Bungaroo Teroomala Naick*, Mad. Dec. of 1851, 74. See cases in Norton's L. C. pp. 279, 478.

[3] *Venkata Narasimha Appa Row* (*Sri Raja*) v. *Parthasarathy Appa Row* (*Sri Raja*) (1913), 41 I. A. 51, at p. 61; 57 Mad. 199, at p. 209; 17 C. W. N. 1221; 15 Bom. L. R. 1010; *Mallikarjuna* (*Srimantu Raja Yarlagadda*) v. *Yarlagadda Durga* (*Srimantu Raja*) (1890), 17 I. A. 134; 13 Mad. 406.

[4] *Sethuramaswamiar* v. *Meruswamiar* (1909), 34 Mad. 470.

[5] *Ram Saran Lall* v. *Ram Narayan Singh* (1914), 42 Calc. 305.

[6] *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494; *Shidhojirav* v. *Naikojirav* (1873), 10 Bom. H. C. 228.

[7] *Ramrao Trimbak Deshpande* v. *Yeshvantrao Madhavrao Deshpande* (1885), 10 Bom. 327. In this case the custom of impartibility was established. See Steele, p. 229.

[8] *Gopalrav* v. *Trimbakrav* (1886), 10 Bom. 598. In that case also the custom of impartibility was established.

[9] *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494. See Bom. Act III. of 1874, s. 8.

[10] See *Gopalrav* v. *Trimbakrav* (1886), 10 Bom. 598.

[11] *Radhabai* v. *Anantrav Bhagvant Deshpande* (1885), 9 Bom. 198; *Ramrao Trimbak Deshpande* v. *Yeshvantrao Madhavrao Deshpande* (1885), 10 Bom. 327.

[12] See *Gopal Hari* v. *Ramakant* (1896), 21 Bom. 458, at p. 462.

[13] *Timmappa Heggade* v. *Mahalinga Heggade* (1868), 4 Mad. H. C. 28.

[14] "Lands granted either rent free or at a low rate of assessment to public ferrymen or to officers guarding passes in the hills. In Birbhum the lands were granted at a fixed rate of assessment in perpetuity to the holders and their descendants, as

Bheerbhoom,[1] *digwari* tenures,[2] and those attached to village offices in Madras.[3]

Hereditary offices.

"Hereditary offices, whether religious or secular, are treated by the Hindu law writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property, by means of a performance of the duties of the office, and the enjoyment of the emoluments by the different coparceners in rotation." [4]

Discontinuance.

There seems to be no reason why a family custom of impartibility should not be discontinued.[5]

Savings from impartible estates.

The question whether property purchased from the income of an impartible estate governed by the Mitakshara school of law, and the savings from the income of such estate, form part of the estate or are the separate property of the owner is a question of intention to incorporate the acquisitions with the original estate.[6]

Burden of proof.

It would seem that the burden of showing that the acquisitions had been incorporated in the original estate lies upon the person alleging that fact.[7]

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long as the revenue is paid, although apparently no longer connected with the performance of any particular duty.—Reg. XXIX., 1814." Wilson's "Glossary," p. 173. See Baden Powell's "Land Systems of British India," vol. i. pp. 532, 582–587.

[1] *Lelanund Sing Bahadoor (Raja)* v. *The Bengal Government* (1855), 6 M. I. A. 101, at p. 125; 1 W. R. P. C. 20; *Hurlall Singh* v. *Jorawun Singh* (1837), 6 Ben. Sel. R. 169 (new edition, 204). See *Nilmoni Singh (Rajah)* v. *Bakranath Singh* (1882), 9 I. A. 104; 9 Calc. 187; *Doorga Pershad Singh (Tekait)* v. *Doorga Kooeree (Tekaetnee)* (1873), 20 W. R. C. R. 154.

[2] *Durga Prasad Singh (Raja Sri Sri)* v. *Brajanath Bose* (1912), 39 I. A. 133; 39 Calc. 696; 16 C. W. N. 482; 14 Bom. L. R. 445.

[3] *Alymalummaul* v. *Vencatoorien*, 2 Mad. Dec. 85, referred to in Mayne's "Hindu Law," 8th ed. 651; *Badu* v. *Hussu Bhai* (1883), 7 Mad. 236.

[4] *Mancharam* v. *Pranshankar* (1882), 6 Bom. 298, at p. 299. As to priestly earnings, see Bhattacharya's "Law of the Joint Family," pp. 459–463; *Khedroo Ojha* v. *Deo Ranee Koomar (Mussamut)* (1866), 5 W. R. C. R. 222; *Becharam Banerjee* v. *Thakoormonee Debia (Sree muttee)* (1868), 10 W. R. C. R. 114.

[5] See *ante*, p. 30.

[6] *Janki Pershad Singh* v. *Dwarka Pershad Singh* (1913), 40 I. A. 170, at p. 181; 35 All. 391, at p. 401; 17 C. W. N. 1029, at p. 1039; 15 Bom. L. R. 853, at p. 862; *Parbati Kumari Debi (Srimati Rani)* v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 98; 29 Calc. 433, at p. 453; 6 C. W. N. 490, at p. 495; 4 Bom. L. R. 365; *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203, at p. 252. As to the private property of a Sovereign Prince, see *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 7 M. I. A. 476, at p. 537; 4 W. R. P. C. 42, at p. 45; Strange's "Hindu Law," vol. ii. pp. 329, 330.

[7] *Jagadamba Kuwari (Rani)* v. *Wazir N. Singh (Thakur)* (1917), 2 Pat. L. J. 239; *Janki Pershad Singh* v. *Dwarka Pershad Singh* (1913), 40 I. A. 170, at p. 181; 35 All. 391, at p. 401; 17 C. W. N. 1029, at p. 1039; 15 Bom. L. R. 853, at p. 862; *Parbati Kumari Debi (Srimati Rani)* v. *Jagadis Chunder Dhabal* (1902), 29 I. A. 82, at p. 98; 29 Calc. 433, at p. 453; 6 C. W. N. 490, at p. 495; 4 Bom. L. R. 365; *Rajeswara Gajapaty Naraina Deo Maharajulungaru (Sri Sri Sri Rajah)*

(e) Grants made out of the revenues of an impartible estate for the maintenance of the junior members of the family and their direct male line (called in some parts of India *babuana* grants,[1] and in the case of grants to women on marriage *sohag* grants.[2]) On the death of the last heir of the grantee these revert to the estate.

As to a *babuana* grant for the benefit of a junior member of the family and his direct male line, see *Ramchandra Marwari* v. *Mudeshwar Singh* (1906), 33 Calc. 1158; 10 C. W. N. 979; *Durgadut Singh* v. *Rameshwar Singh* (1909), 36 I. A. 176; 36 Calc. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901; *Lalitesuar Singh* v. *Bhabeswar Singh* (1908), 35 Calc. 823; 12 C. W. N. 958; *Ekradeswar Singh* v. *Janeshwari Babuasin* (1914), 41 I. A. 275; 42 Calc. 582; 18 C. W. N. 1249; 17 Bom. L. R. 18. According to *Hazari Mall Babu* v. *Abaninath Adhurjya* (1912), 17 C. W. N. 280, at p. 287, in the case of property being carved out of an impartible estate for the maintenance of a son and his descendants "the view may be maintained that it has all the incidents of ancestral property."

Except that it may be liable for the maintenance of the younger members of the family,[3] an impartible estate itself cannot be regarded as coparcenary property, inasmuch as by the custom of the family, it is held by a single individual.[4] Not coparcenary property.

It is the exclusive property of the owner, subject to any custom restricting his powers of alienation, and no other member of the family has any joint interest in it.[5]

It was formerly considered that coparcenary property would include property which by custom is held and enjoyed by a single member of the family, but in which there was a right of survivorship.[6]

In a recent case in Bombay,[7] Jenkins, C.J., said this: "No doubt

v. *Virapratapah Rudra Gajapaty Naraina Deo Maharajulungaru* (*Sri Sri Sri*) (1869), 5 Mad. H. C. 31, at p. 41; *Kotta Ramasmi Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 150. A different view was expressed in *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1904), 27 All. 203, at p. 252; *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (1893), 17 Mad. 422, at p. 444. Cf. *post*, pp. 474, 475.

[1] *Durgadut Singh* v. *Rameshwar Singh Bahadur* (*Maharajah Sir*) (1909), 36 I. A. 176; 36 Calc. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901. As to the alienation of such grants, see *ibid.*

[2] *Ekradeswar Singh* v. *Janeshwari Babuasin* (1914), 41 I. A. 275; 42 Calc. 582; 18 C. W. N. 1249; 17 Bom. L. R. 18.

[3] *Laliteshwar Singh* v. *Rameshwar Singh* (1909), 36 Calc. 481, at p. 483; 13 C. W. N. 838, at p. 841; see *Gur Pershad Singh* v. *Dhani Rai* (1910), 38 Calc. 182; 15 C. W. N. 49. This liability arises from the relationship of the individual to the holder, and not on account of any coparcenary interest: *Rama Row* (*Sri Rajah*) v. *Rajah of Pittapur* (1915), 39 Mad. 396.

[4] See *Tara Kumari* (*Thakurani*) v. *Chaturbhuj Narayan Singh* (1915), 42 I. A. 192; 42 Calc. 1179; 19 C. W. N. 1119; 17 Bom. L. R. 1012. It was held otherwise in *Bawani Ghulam* v. *Deo Raj Kuari* (1883), 5 All. 542; but see below.

[5] *Zamindar of Karvetnagar* v. *Dossji Varu* (*Sree Mahant*) (1909), 32 Mad. 429.

[6] See *ante*, pp. 260, 261.

[7] *Bachoo* v. *Mankorebai* (1904), 29 Bom. 51, at p. 57; 6 Bom. L. R. 268; S. C. on appeal, *Bachoo Harkisondas*

the property claimed in *Raghunadha's* case [1] was impartible, but at one time it was the common notion that even in impartible property all the male members of a joint family were coparceners subject to the qualification that the enjoyment was by one member of the family alone, and it was considered, rightly or wrongly, that there was warrant for this view in a number of decisions of the Privy Council, and notably *Naragunty* v. *Vengama*,[2] *Shivagunga* case,[3] the *Tipperah* case,[4] *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondara*,[5] *Chowdhry Chintamun Singh* v. *Mussamut Nowlucko Konwari*.[6] I mention these cases as to all of them Sir James Colville, who delivered the judgment in *Raghunadha's* case, was a party; and if it was his view that the impartible zemindari belonged to the whole family, then the decision in *Raghunadha's* case would seem to have proceeded on circumstances very closely resembling those with which we are now dealing. But whatever may have been the opinion that prevailed at that time, it has now been definitely decided by the Privy Council in *Rani Sartaj Kuari* v. *Rani Devraj Kuari*,[7] and in *Sri Raja Rao Venkata Surya* v. *Court of Wards*,[8] that in impartible properties there is no coparcenary, so that in the light of these latter decisions it cannot be said that the conditions in *Raghunadha's* case were in all respects identical with those now under consideration."

No question of separation in estate [9] can arise in the case of an impartible Raj; as there is nothing upon which such separation can operate.[10]

According to the Madras High Court the successor to an impartible estate governed by the Mitakshara law cannot recover debts due to his predecessor without a certificate under Act VII. of 1889.[11] According to the Calcutta High Court he does not require a certificate.[12] It is submitted that the latter view is correct.

As to inheritance to impartible property, see *post*, Chap. XVII.

Alienation. The holder of an impartible estate can, in the absence of a

v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646; see also *Rajah of Kalahasti* v. *Achigadu* (1905), 30 Mad. 454, differing from *Nachiappa Chettiar* v. *Chinnayasami Naicker* (1906), 29 Mad. 459, and from *Kali Krishna Sarkar* v. *Raghunath Deb* (1903), 31 Calc. 224; *Rama Row (Sri Rajah)* v. *Rajah of Pittapur* (1915), 39 Mad. 396. In *Baijnath Prasad Singh* v. *Tej Bali Singh* (1916), 38 All. 590, it was considered that the impartible property was joint family property. *Zamindar of Karvetnagar* v. *Dossji Varu (Sree Mahant)* (1909), 32 Mad. 429; *Ram Das Marwari* v. *Braja Behari Singh (Tekait)* (1902), 6 C. W. N. 879.

[1] *Raghunada (Sri)* v. *Brozo Kishoro (Sri)* (1876), 3 I. A. 154; 1 Mad. 69.

[2] (1861), 9 M. I. A. 66, at p. 86; 1 W. R. P. C. 30.

[3] (1863), 9 M. I. A. 543, at p. 589; 2 W. R. P. C. 31.

[4] (1869), 12 M. I. A. 523, at p. 540; 3 B. L. R. P. C. 13.

[5] (1870), 13 M. I. A. 333, at p. 339; 13 W. R. P. C. 21.

[6] (1875), 2 I. A. 263, at pp. 269, 270; 1 Calc. 153.

[7] (1888), 15 I. A. 51; 10 All. 272.

[8] (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; 1 Bom. L. R. 777.

[9] *Post*, p. 325.

[10] *Laliteshwar Singh* v. *Rameshwar Singh* (1909), 36 Calc. 481; 14 C. W. N. 49.

[11] *Rajah of Kalahasti* v. *Achigadu* (1905), 30 Mad. 454.

[12] *Gur Pershad Singh* v. *Dhani Rai* (1910), 38 Calc. 182; 15 C. W. N. 49.

custom rendering it inalienable,[1] dispose thereof by will or transfer *inter vivos*, whether he be governed by the Mitakshara [2] or by the Bengal [3] school of law.

Where a gift or bequest is made out of such property to a son the son in a case governed by the Mitakshara law takes the subject of the gift or bequests as ancestral or coparcenary property.[4]

As to the alienation of a *babuana* grant, see *Durgadut Singh* v. *Rameshwar Singh Bahadur* (*Maharajah*) (1909), 36 I. A. 176; 36 Calc. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901.

A sale which took place at a time when the accepted interpretation of the law was that an impartible estate was inalienable was construed with reference to the law as it then stood.[5]

When the estate is inalienable, the holder can sell or charge it,[6] in case of such a necessity as would justify the manager of an infant heir in a sale or charge.[7]

Madras Acts II. of 1902, II. of 1903, II. of 1904,[8] and VI. of 1909, have rendered the holders of nearly all the impartible estates in the Madras Presidency incapable of alienating or binding by their debts the estate except under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other coparceners independently of their consent.

Impartible property which has been sold does not retain its character of impartibility.

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[1] *Sivasubramania Naicker* v. *Krishnammal* (1894), 18 Mad. 287.

[2] *Venkata Surya Mahipati Rama Krishna Rao Bahadur* (*Sri Raja Rao*) v. *Court of Wards* (1899), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; 1 Bom. L. R. 277; *Sartaj Kuari* (*Rani*) v. *Deoraj Kuari* (*Rani*) (1888), 15 I. A. 51; 10 All. 272; *Tara Kumari* (*Thakurani*) v. *Chaturbhuj Narayan Singh* (1915), 42 I. A. 192; 42 Calc. 1179; 19 C. W. N. 1119; 17 Bom. L. R. 1012; *Venkata Narasimha Naidu* v. *Bhashyakarlu Naidu* (1899), 22 Mad. 538, upheld on appeal (1902), 29 I. A. 76; 25 Mad. 367; 6 C. W. N. 641; 4 Bom. L. R. 543; *Ram Das Marwari* v. *Braja Behari Singh* (*Tekait*) (1902), 6 C. W. N. 879; *Beresford* v. *Ramasubba* (1889), 13 Mad. 197; *Rup Singh* v. *Pirbhu Narain Singh* (1898), 20 All. 537; *Kapilnauth Sahai Deo* (*Thakoor*) v. *The Government* (1874), 13 B. L. R. 445, at pp. 458–460; 22 W. R. C. R. 17, at pp. 20, 21.

[3] *Uduya Aditya Deb* (*Rajah*) v. *Jadub Lal Aditya Deb* (1881), 8 I. A. 248; 8 Calc. 199. S. C. in Court below, 5 Calc. 113; 4 C. L. R. 181; *Narain Khootia* v. *Lokenath Khootia* (1881), 7 Calc. 461; 9 C. L. R. 243.

[4] *Hazari Mull Babu* v. *Abaninath Adhurjya* (1912), 17 C. W. N. 280.

[5] *Abdul Aziz Khan Sahib* v. *Appayasami Naicker* (1903), 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 186.

[6] *Gopal Prosad Bhakat* v. *Raghunath Deb* (1904), 32 Calc. 158; 9 C. W. N. 330.

[7] *Post*, pp. 288–290.

[8] Sec. 4.

CHAPTER VII.

MANAGEMENT AND DISPOSAL OF PROPERTY OF JOINT FAMILY.

Application proceeds of coparcenary property.

"THE proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the mode of enjoyment by the members of an undivided family." [1]

This principle was laid down in a case governed by the Mitakshara school of law, but it would apply also to a joint family governed by the Bengal school of law, it being remembered that in the latter case sons have not during their father's lifetime any interest in the family chest or purse.

Payments on behalf of family.

Although a coparcener is not entitled ordinarily to credit for moneys paid by him out of his own funds for the benefit of the family on the improvement of the estate,[2] he is entitled to such credit where it is clear that he reserved his right to such credit, as where he paid the money to save the coparcenary estate from sale for arrears of Government revenue.[3]

All coparceners to be parties to transactions.

Except where in a coparcenary governed by the Mitakshara the father has power to act independently of his sons,[4] each coparcener must either himself, or by a manager having power in that behalf, be a party to every transaction relating to the coparcenary property.[5]

No coparcener, unless he be the manager, has power to enhance rent or eject tenants at his pleasure.[6]

It has been held [7] that in the absence of fraud payment to one of several joint proprietors is a payment to all. This would, it is submitted, depend upon the circumstances. Where there is a manager a tenant would rarely

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[1] *Appovier* v. *Rama Subba Ayyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1.

[2] *Muttusvami Gaundan* v. *Subbiramanya Gaundan* (1863), 1 Mad. H. C. 309.

[3] *Vizianagram* (*Rajah of*) v. *Setrucherla Somasekharadaz* (*Rajah*) (1903), 26 Mad. 686.

[4] Viz. in alienating for the purpose of paying antecedent debts, *post*, chap. viii.

[5] See *Sangappa* v. *Sahebanna* (1870), 7 Bom. H. C. A. 141; *Ghunshyam Singh* v. *Runjeet Singh* (1865), 4 W. R., Act X. R. 39.

[6] *Balaji Baikaji Pinge* v. *Gopal* (1878), 3 Bom. 23. See cases *post*, p. 268, note 5, and p. 268, note 6.

[7] *Ibrahim Tharagan* (*Sheik*) v. *Rama Aiyar* (1911), 35 Mad. 685; *Oodit Narain Singh* v. *Hudson* (1865), 2 W. R., Act X. R. 15.

be entitled to pay to any other coparcener. Under some circumstances a debtor might get a discharge by payment to one coparcener,[1] but it would ordinarily be safer for him to require a receipt from the manager or from the whole body of coparceners.

Parties to suits.

Except that the manager of a joint family business can enforce at law the ordinary business contracts which he is entitled to make or discharge in his own name without making his coparceners parties to the suit,[2] and that where credit is given to an individual member he can sue alone,[3] and that a manager of a family can sue for trespass on the family waste lands,[4] all the coparceners should be parties to a suit or execution proceedings relating to the coparcenary property,[5] or to a trade or business belonging to the family,[6] even if it be founded on a transaction which was validly entered into by the manager,[7] but a decree made at the instance of, or against, the father [8] or other manager, as representing the family,[9] without any objection being made as to want of parties, binds the other coparceners.[10]

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[1] See *Gurushantappa* v. *Chanmallappa* (1899), 24 Bom. 123.

[2] *Kishen Parshad* v. *Har Narain Singh* (1911), 38 I. A. 45; 33 All. 272; 15 C. W. N. 321; 13 Bom. L. R. 359, differing from *Alagappa Chetti* v. *Velian Chetti* (1894), 18 Mad. 33; *Lalji* v. *Keshowji* (1912), 37 Bom. 340; 14 Bom. L. R. 840; *Gopal Das* v. *Badri Nath* (1904), 27 All. 361; *Durga Prasad* v. *Damodar Das* (1909), 32 All. 183.

[3] *Bando Subrao Jamnis* v. *Janbu Tavnappa Adake* (1910), 12 Bom. L. R. 801.

[4] *Muhammad Sadik* v. *Khedan Lall* (1916), 1 Pat. L. J. 154.

[5] See Civil Procedure Code (Act V. of 1908), order i. rules 1, 3, 4; Act XIV. of 1882, ss. 26, 28. *Guruvayya Gouda* v. *Dattatraya Anant* (1903), 28 Bom. 11; *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157; *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307; *Balkrishna Sakharam* v. *Moro Krishna Dabholkar* (1896), 21 Bom. 154; *Banarsi Das* v. *Maharani Kuar* (1882), 5 All. 27; *Phoolbas Koonwur (Mussumat)* v. *Juggeshur Sahoy* (1876), 3 I. A. 7, at p. 26; 1 Calc. 226, at pp. 243, 244; 25 W. R. C. R. 285, at p. 289; *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Gopal* v. *Macnaghten* (1881), 7 Calc. 751; *Unnoda Persad Roy* v. *Erskine* (1873), 12 B. L. R. 370; 21 W. R. C. R. 68; *Nathuni Mahton* v. *Manraj Mahton* (1876), 2 Calc. 149; *Sheo Churn Narain Singh* v. *Chukraree Pershad Narain Singh* (1871), 15 W. R. C. R. 436; *Nundun Lall* v. *Lloyd* (1874), 22 W. R. C. R. 74; *Arunachala Pillai* v. *Vythialinga Mudaliyar* (1882), 6 Mad. 27; *Hari Gopal* v. *Gokaldas Kushabashet* (1887), 12 Bom. 158; *Naranji* v. *Moti* (1907), 9 Bom. L. R. 1126.

[6] *Jugal Kishore* v. *Hulasi Ram* (1886), 8 All. 264; *Ramsebuk* v. *Ramlall Koondoo* (1881), 6 Calc. 815; 8 C. L. R. 457. See *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157; *Anant Ram* v. *Channu Lal* (1903), 25 All. 378.

[7] *Jas Ram* v. *Sher Singh* (1902), 25 All. 162. As to mortgages by the father, see *post*, pp. 308, 309.

[8] See Civil Procedure Code (Act V. of 1908), order i. r. 13.

[9] *Girwar Narain Mahton* v. *Makbunessa* (1916), 1 Pat. L. J. 468.

[10] *Post*, pp. 278–282.

It has been held in Madras[1] that the decision of the Privy Council in *Kishen Parshad* v. *Har Narain Singh*[2] entitles the manager to sue alone, but it is submitted that the Judicial Committee did not lay down any such general rule.

It has also been held in Allahabad[3] that a manager can sue even on a mortgage[4] on behalf of the family.

One coparcener cannot sue alone to eject a tenant,[5] and cannot sue alone for enhancement of rent,[6] or for his share of the rent,[7] unless by an express or implied arrangement between the coparceners and the tenant he collects his share separately.[8] He cannot sue alone for a debt.[9]

In *Ramayya* v. *Venkataratnam*,[10] where a suit was brought by a manager as representative of the family, the Court considered that the omission to make the coparcener a party was a mere formal error.

When a coparcener declines to be a plaintiff,[11] or where he is acting in

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[1] *Ibrahim Tharagan (Sheik)* v. *Rama Aiyar* (1911), 35 Mad. 685.

[2] (1911), 38 I. A. 45; 33 All. 272; 15 C. W. N. 321; 13 Bom. L. R. 359.

[3] *Hori Lal* v. *Munman Kunwar* (1912), 34 All. 549; *Madan Lal* v. *Kishan Singh* (1912), *Ibid.* 572.

[4] *Post*, p. 281.

[5] *Reasut Hossein* v. *Chorwar Singh* (1881), 7 Calc. 470; 9 C. L. R. 260; *Sri Chand* v. *Nimchand Sahu* (1870), 5 B. L. R. App. 25; 13 W. R. C. R. 337; *Krishnarav Jahagirdar* v. *Govind Trimbak* (1875), 12 Bom. H. C. 85.

[6] *Jatindra Nath Chowdhri (Roy)* v. *Prasanna Kumar Banerji* (1910), 38 I. A. 1; 38 Calc. 270; 15 C. W. N. 74; 13 Bom. L. R. 1; *Jogendro Chunder Ghose* v. *Nobin Chunder Chottopadhya* (1882), 8 Calc. 353; *Balkrishna Sakharam* v. *Moro Krishna Dabholkar* (1896), 21 Bom. 154. As to a suit by a registered zemindar under Act VIII. (M. C.) of 1865, see *Ayyappa* v. *Venkata Krishnamarazu* (1892), 15 Mad. 484.

[7] *Bhyrub Mundul* v. *Gungaram Bonnerjee* (1872), 12 B. L. R. 290, note; 17 W. R. C. R. 408; *Hurkishor Das Bhooya* v. *Joogul Kishor Saha Roy* (1871), 12 B. L. R. 293, note; 16 W. R. C. R. 281; *Annoda Churn Roy* v. *Kally Coomar Roy* (1878), 4 Calc. 89; 2 C. L. R. 464.

[8] *Guni Mahomed* v. *Doorga Proshad Mytse* (1878), 4 Calc. 96; 2 C. L. R. 370; *Ganga Narayan Das* v. *Saroda Mohan Roy* (1869), 3 B. L. R. A. C. 230; 12 W. R. C. R. 30; *Lootfulhuck* v. *Gopee Churn Mojoomdar* (1880), 5 Calc. 941; 6 C. L. R. 402; *Doorga Churn Surma* v. *Jampa Dassee* (1873), 12 B. L. R. 289; 21 W. R. C. R. 46; *Rakhal Chunder Roy Chowdhry* v. *Mahtab Khan* (1876), 25 W. R. C. R. 221; *Dinobundhoo Chowdhry* v. *Dinonath Mookerjee* (1873), 19 W. R. C. R. 168; *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311; *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (1906), 30 Bom. 477; 8 Bom. L. R. 268; *Haradhun Gossamee* v. *Ram Newaz Missry* (1872), 17 W. R. C. R. 414; *Salehoonissa Khatoon* v. *Mohesh Chunder Roy* (1872), 17 W. R. C. R. 452; *Sree Misser* v. *Crowdy* (1871), 15 W. R. C. R. 243.

[9] *Shivjiram* v. *Vishnu* (1900), 2 Bom. L. R. 121.

[10] (1893), 17 Mad. 122, at pp. 126, 127.

[11] *Rajaram Tewari* v. *Lachman Prasad* (1869), 4 B. L. R. A. C. 118; 12 W. R. C. R. 478; *Dwarkanath Mitter* v. *Tara Prosunna Roy* (1889), 17 Calc. 160; *Kali Chandra Singh* v. *Rajkishore Bhuddro* (1885), 11 Calc. 615; *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad* (1881), 3 Mad. 234; *Parameswaran* v. *Shangaran* (1891), 14 Mad. 489; *Juggodumba Dossee* v. *Haran Chunder Dutt* (1868), 10 W. R. C. R. 108; *Gokool Pershad* v. *Etwaree Mahto* (1873), 20 W. R. C. R. 138.

collusion with the tenant [1] or other person sued, he may be joined as a defendant.[2]

If the suit be barred against some of them, the whole suit fails.[3]

As to the effect of a decree in a suit by or against a manager, see *ante*, p. 267, and *post*, pp. 278, 279.

It has been held that where one of the family has entered into a contract in his own name he can enforce it alone.[4]

Where he has been put in possession of a portion of the property by the others, he may be able to sue alone in respect of it.[5]

A coparcener can sue for damages for an act by which he is individually damnified.[6]

MANAGER.

The property of a joint family is ordinarily managed by one of the coparceners who is entitled to possession of the family property as such manager.[7] The father, if living, of a family governed by the Mitakshara school of law would be the manager.[8] In other cases, the eldest male member of the family would ordinarily, but not necessarily, be selected.[9] Manager.

When the coparceners cannot agree as to the selection of a manager, a partition seems to be the only practical remedy.

The manager is called the "*Karta.*"

As to the management of a religious or charitable endowment, see *post*, pp. 556–559.

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[1] *Jadu Dass* v. *Sutherland* (1878), 4 Calc. 556; 3 C. L. R. 223; *Doorga Churn Surma* v. *Jampa Dassee* (1873), 12 B. L. R. 289; 21 W. R. C. R. 46. See, however, *Jadoo Shat* v. *Kadumbinee Dassee* (1881), 7 Calc. 150.

[2] *Pramada Nath Roy (Raja)* v. *Ramani Kanta Roy (Raja)* (1907), 35 I. A. 73; 35 Calc. 331; 12 C. W. N. 249; 10 Bom. L. R. 66.

[3] *Kalidas Kevaldas* v. *Nathu Bhagvan* (1883), 7 Bom. 217; *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311; *Ramsebuk* v. *Ramlall Koondoo* (1881), 6 Calc. 815; 8 C. L. R. 457; *contrâ Labhu Ram* v. *Kanshi Ram* (1905), 76 P. L. R. Cf. *Ramdoyal* v. *Junmenjoy Coondoo* (1887), 14 Calc. 791.

[4] *Bungsee Singh* v. *Soodisht Lall* (1881), 7 Calc. 739; 10 C. L. R. 263; see *ante*, p. 267, note 2.

[5] *Amir Singh* v. *Moazzum Ali Khan* (1875), 7 N. W. P. 58.

[6] *Gopee Kishen Gossain* v. *Ryland* (1868), 9 W. R. C. R. 279. As, for instance, a claim for mesne profits, *Chundee Chowdhry* v. *Macnaghten* (1875), 23 W. R. C. R. 386.

[7] *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu* (1908), 31 Mad. 318.

[8] See *Surja Prosad (Lala)* v. *Golab Chand* (1900), 27 Calc. 724, at p. 743; 4 C. W. N. 701, at p. 711; *Gajindra Narain (Rai)* v. *Harihar Narain (Rai)* (1908), 12 C. W. N. 687.

[9] See K. K. Bhattacharya's "Joint Hindu Family," pp. 209, 223. As to the disqualification of a father or other manager, see *ibid.*, pp. 220, 221.

Where there is only one adult member of the family, the Court will recognize an appointment of a manager by him to take effect after his death.[1]

The manager is not an ordinary agent of the family.[2] He is thus described by Mr. Cowell[3]: "When, therefore, we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact with a relationship which has no counterpart in English law. Neither the term 'partner,' nor 'principal,' nor 'agent,' nor even 'coparcener,' will strictly apply. He is, in fact, a sort of representative owner, his independent rights being limited on all sides by the correlative rights of others, and burdened with a liability, coextensive with his ownership, to provide for the maintenance of the family."

In dealing with the same question, the Judicial Committee said,[4] "The relation of such persons is not that of principal, or agent, or of partners; it is much more like that of trustee and cestui que trust."

Guardianship of share in joint family property.

The manager is the *de facto* guardian of the interests of minor coparceners in the coparcenary property.[5]

"A guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family . . . on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property."[6] These observations of the Judicial Committee would apparently apply also to

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[1] *Mahableshvar* v. *Ramchandra* (1913), 38 Bom. 94; 15 Bom. L. R. 882; *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209; 2 B. L. R. P. C. 57; 12 W. R. P. C. 47.

[2] *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307, at pp. 317, 320; *Kandasami Asari* v. *Somaskanda Ela Nedhi* (1910), 35 Mad. 177.

[3] "Tagore Law Lectures," 1870, p. 108.

[4] *Annamalai Chetty* v. *Murugasa Chetty* (1903), 30 I. A. 220, at p. 228; 26 Mad. 544, at p. 553; 7 C. W. N. 754, at p. 765; 5 Bom. L. R. 494. See *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483.

[5] As to his powers of sale, see *post*, pp. 283 *et seq.*

[6] *Gharib-ul-lah* v. *Khalak Singh* (1903), 30 I. A. 165, at p. 170; 25 All. 407, at p. 416; 7 C. W. N. 681; 5 Bom. L. R. 478, at p. 687; *Bindaji Laxuman Triputikar* v. *Mathurabai* (1905), 30 Bom. 152. See *Bandhu Prasad* v. *Dhiraji Kuar* (1898), 20 All. 400; *Virupakshappa* v. *Nilgangava* (1894), 19 Bom. 309; *Sham Kuar* v. *Mohanunda Sahoy* (1891), 19 Calc. 301; *Jhabbu Singh* v. *Ganga Bishan* (1895), 17 All. 529. In *Doorga Persad* v. *Kesho Persad Singh* (1882), 9 I. A. 27; 8 Calc. 656, it was taken for granted that a certificate under Act XL. of 1858 could be given to a co-sharer. Cf. Act IV. of 1892, s. 2; Act I. (M. C.) of 1902, s. 17.

the appointment of a guardian by a High Court.[1] This principle does not apply when all the coparceners are minors and a guardian of the property is appointed of the whole number, but the order should reserve liberty to any minor on attaining majority to apply for removal of the guardian or restriction of his power.[2]

Where the minor has separate property there would be no objection to the appointment of a guardian,[3] and in any case a guardian of his person can be appointed.[4]

Representation of authority.

When the members of the family have represented that a member other than the manager is entitled to act as such, they are bound by his acts as much as if he had been *de jure* manager.[5]

Duty of manager.

The duty of the father or other manager is to manage the property of the joint family for the benefit of such family as a whole;[6] to realize the income of the family property, pay the debts,[7] and other outgoings connected with the management, and expend the residue for the benefit of the family and its members. He must provide for the maintenance, education, marriages, sradhs, and other usual religious expenses of the coparceners,[8] and of such members of their family as they are, or were when alive, legally or morally bound to maintain,[9] including their illegitimate sons when not coparceners,[10] and also of persons disqualified from inheritance and their families.[11]

[1] In *In re Manilal Hurgovan* (1900), 25 Bom. 353, the High Court of Bombay, under its general jurisdiction, and apart from the Guardians and Wards Act, appointed a guardian of the interest of a minor in property held by a family governed by the Mitakshara school of Hindu law. In doing so the Court said (at p. 357), "But in coming to this conclusion we desire to add that it is a power to be exercised with the greatest caution. We make the appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case." See also *Jairam Luxmon* (1892), 16 Bom. 634; *Jagannath Ramji* (1893), 19 Bom. 96.

[2] *Bindaji Laxuman Triputikar* v. *Mathurabai* (1905), 30 Bom. 152.

[3] See *Bandhu Prasad* v. *Dhiraji Kuar* (1898), 20 All. 400.

[4] *Virupakshappa* v. *Nilgangava* (1894), 19 Bom. 309.

[5] See *Mudit Narayan Singh* v. *Ranglal Singh* (1902), 29 Calc. 797; *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597. Act I. of 1872, s. 115.

[6] See *Bhowani Proshad Shahu* v. *Juggernath Shahu* (1909), 13 C. W. N. 309.

[7] Where he cannot pay the debts out of income, he may have to alienate the property, see *post*, pp. 283 *et seq.*

[8] *Ante*, pp. 234, 235.

[9] As to widows, see *ante*, p. 89. As to the marriage of daughters, see *Vaikuntam Ammangar* v. *Kallapiran Ayyangar* (1900), 23 Mad. 512.

[10] *Ante*, pp. 227, 228.

[11] *Ante*, pp. 228, 229. "Mitakshara," chap. ii. s. 10, paras. 12–14; "Dayabhaga," chap. v. paras. 10, 11; "Vyavahara Mayukha," chap. iv.

In expending money for the benefit of an individual member or his family, he need not take into account the share which such member would be entitled to on a partition.[1]

Provided he administers the property for the benefit of the family the manager is not bound to economize or save.[2]

Discretion of manager.

Where the discretion of the managing member is exercised *bonâ fide* and for the benefit of the estate, and the family have the benefit, such discretion should not be narrowly scrutinized.[3]

Account by manager.

In a suit for partition a coparcener can, it is submitted, require the manager to furnish an account of his dealings with the coparcenary property for the purpose of ascertaining the amount of the property to be partitioned, although he has no right to claim relief in respect of past inequality in the enjoyment of the property.

This right was affirmed in *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271; and in *Parmeshwar Dube* v. *Gobind Dube* (1915), 43 Calc. 459; 20 C. W. N. 25; but in *Bhowani Proshad Shahu* v. *Juggernath Shahu* (1909), 13 C. W. N. 309; *Balakrishna Iyer* v. *Muthusami Iyer* (1908), 32 Mad. 271, and *Narayan* v. *Rajaram* (1903), 28 Bom. 201, it was held that such right did not exist except in case of fraud or misrepresentation.

It is difficult to see how in the absence of such an account there can be a complete enquiry as to what the family property consists of at the time of the partition.

In the case of a partition between members who have been in possession of different portions there may be no such right to an account.[4]

Although he does not seek for partition, a coparcener, who does not himself take part in the management of the property, may at any time by suit require the manager to account for his dealings with the family property,[5] but he is not entitled, while he remains undivided, to require any particular share of the profits to be made over to him.[6]

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s. 11, para. 10; "Dattaka Chandrika," s. 6, para. 2; K. K. Bhattacharya's "Law of the Joint Hindu Family," p. 295. A list of the persons entitled under the Rishi texts to maintenance, is to be found in R. C. Mitra's "Law of Joint Property," pp. 66–68.

[1] See K. K. Bhattacharya, "Law of the Joint Hindu Family," p. 193.

[2] *Bhowani Proshad Shahu* v. *Juggernath Shahu* (1909), 13 C. W. N. 309.

[3] *Ratnam* v. *Govindarajulu* (1877), 2 Mad. 339, at p. 341.

[4] *Konerrav* v. *Gurrav* (1881), 5 Bom. 589, as explained in *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271, at pp. 278, 279.

[5] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347; 13 W. R. F. B. R. 75; *Nowlaso Kooeree* (*Mussamut*) v. *Lalljee Modi* (1874), 22 W. R. C. R. 202.

[6] See *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R. 256, at p. 259; *Ganpat*

The cost of taking such account would probably not be on the same footing as the costs of an account, which is ancillary to partition. The Court would probably, unless default appeared in the manager's accounts, or unless the manager had declined to render any information to his coparceners, or where the person seeking the account was in possession of complete information as to the accounts, require the coparcener asking for an account to pay the costs. Where the account is ancillary to the partition, the costs would ordinarily be borne in proportion to the shares.

In furnishing such account, whether in a suit for partition or not, the managing member of a joint family is entitled to credit for all sums of money *bonâ fide* spent by him for the benefit of the joint family. He must be debited with all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested.[1]

"What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it, must . . . depend on the conduct of the manager and the other members, the nature of the property, and the circumstances of the family, and cannot be satisfactorily stated in definite terms." [2]

"Of course no member of a joint Hindu family is liable to his coparceners for anything which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of those daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate." [3]

Arrangement as to management.

It is competent to the members of the family to make a special

v. *Annaji* (1898), 23 Bom. 144; *Chuckun Lall Singh* v. *Poran Chunder Singh* (1868), 9 W. R. C. R. 483, as explained in *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at pp. 354–356; 13 W. R. F. B. R. 75, at p. 79; *Nowlaso Kooeree (Mussamut)* v. *Lalljee Modi* (1874), 22 W. R. C. R. 202.

[1] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at p. 349; 13 W. R. F. B. R. 75; *Parmeshwar Dube* v. *Gobind Dube* (1915), 43 Calc. 459; 20 C. W. N. 1.

[2] *Damodardas Maneklal* v *Uttamram Maneklal* (1892), 17 Bom. 271, at p. 279.

[3] *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho* (1870), 5 B. L. R. 347, at p. 349; 13 W. R. F. B. R. 75. See *Soorjeemoney Dossee (Sreemutty)* v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at p. 540. See *Ranganmani Dasi (S. M.)* v. *Kasinath Dutt* (1868), 3 B. L. R. O. C. 1, at p. 4, differed from on another point in *Abhaychandra Roy Chowdhry* v. *Pyarimohan Guho* (1870), 5 B. L. R. 347; 13 W. R. F. B. R. 75.

arrangement as to the accountability of the manager,[1] or as to the way in which the family is to be managed.

Separate account of expenditure.

By arrangement a manager may keep a separate account of expenditure on behalf of a particular member of the family, and on a partition such member may become liable for the amount appearing due on such account.[2]

A coparcener is not, except under special circumstances, entitled to ask for an account of a portion of the property only. Where a trading business forms a part of the assets of the joint family, one member cannot sue for an account of past profits and losses, apart from the accounts of the joint family.[3]

Powers of manager.

The manager represents the family in transactions with outsiders.[4] He has the ordinary powers incident to the due management of the property; [5] as, for instance, he can receive payments and give receipts, and can execute decrees on behalf of the family; [6] but he can act only with the assent, express or implied, of the body of coparceners.[7]

In a partition the manager of a branch of the family is entitled to represent the other members of that branch.[8]

Family business.

Where a portion of the family assets consists of a trade or other business, the manager, or other member of the family in charge of the business, has all the powers which are usually exercised by a person carrying on such business, and can bind the members of the family personally by debts properly incurred for the purposes of the business.[9] He can make contracts, give

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[1] *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533; 1 Bom. L. R. 388. See *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397.

[2] *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (1857), 6 M. I. A. 526, at p. 540.

[3] See *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38, at p. 40.

[4] See *Vithu Dhondi* v. *Babaji* (1908), 32 Bom. 375; 10 Bom. L. R. 505; *Hori Lal* v. *Munman Kunwar* (1912), 34 All. 549, at p. 554.

[5] See *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 150; *Golapdi Meah* v. *Purno Chandra Dutta* (1917), 21 C. W. H. 774.

[6] *Achhaibar Singh* v. *Ram Sarup Sahu* (1913), 35 All. 380.

[7] *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1886), 11 Bom. 320, at p. 324.

[8] *Brijraj Singh* v. *Sheodan Singh* (1913), 40 I. A. 161, at p. 167; 35 All. 337, at p. 346; 17 C. W. N. 949, at p. 954; 15 Bom. L. R. 652, at p. 658.

[9] *Ramlal Thakursidas* v. *Lakhmichand Muniram* (1861), 1 Bom. H. C. App. li.; *Samalbhai Nathubhai* v. *Someshvar* (1880), 5 Bom. 38; *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (1901), 26 Bom. 206; *Bemola Dossee* v. *Mohun Dossee* (1880), 5 Calc. 792; 6 C. L. R. 34; *Johurra Bibee* v. *Sree Gopal Misser* (1876), 1 Calc. 470; *Prem Chand Bauthra* v. *Radhica Lall Roy* (1877), 1 Shome, 1; *Joykisto Cowar* v. *Nittyanund Nundy* (1878), 3 Calc. 738; 2 C. L. R. 440; *Baldeo Sonar* v. *Mobarak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370; *Sheo Pershad Singh* v. *Raj Kumar Lal* (1892), 20

receipts, and compromise, or discharge claims ordinarily incidental to the business.[1]

As to the rights of the Official Assignee when the manager becomes insolvent, see *Grey* v. *Walker* (1913), 48 Calc. 523.

Minor members are only liable to the extent of the assets of the business,[2] *i.e.* property which has been used by the family for the purposes of the trade, or which has been acquired out of the profits thereof.[3]

Some of the decisions make the interest of the minor in the whole family property liable,[4] but the above limitation of liability is, it is submitted, correct.[5]

"A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading partnership which carries on the business. He can only become a member of the partnership by a consentient act on the part of himself and the partners." [6]

The manager cannot start a new business so as to bind minor coparceners,[7] or adult coparceners who do not consent.

The fact that all the coparceners are partners in the business must, if disputed, be proved.[8]

Where the business is carried on by the manager on behalf of the family in partnership with a stranger, the death of the manager dissolves the

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Calc. 453; *Morrison* v. *Verschoyle* (1901), 6 C. W. N. 429, at p. 458; *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725. *In the matter of Haroon Mahomed* (1890), 14 Bom. 189; *Nunna Setti* v. *Chidaraboyina* (1902), 26 Mad. 214; *Gokal Kastur* v. *Amarchand* (1907), 9 Bom. L. R. 1289. See *Joharmal Ladhooram* v. *Chetram Hari Singh* (1914), 39 Bom. 715; 17 Bom. L. R. 293.

[1] *Kishen Parshad* v. *Har Narain Singh* (1911), 38 I. A. 45, at p. 51; 33 All. 272, at p. 276; 15 C. W. N. 321, at p. 326; 13 Bom. L. R. 359, at p. 365; *Raghunathji Tarachand* v. *Bank of Bombay* (1909), 34 Bom. 72; 11 Bom. L. R. 255.

[2] *Sanka Krishnamurthi* v. *Bank of Burma* (1911), 35 Mad. 692.

[3] See *Johurra Bibee* v. *Sree Gopal Misser* (1876), 1 Calc. 470; *Bishambhar Nath* v. *Sheo Narain* (1906), 29 All. 166; *Bishambhar Nath* v. *Fateh Lal* (1906), 29 All. 176; *Joykisto Cowar* v. *Nittyanund Nundy* (1878), 3 Calc. 738; 2 C. L. R. 440; *Gokal Kastur* v. *Amarchand* (1907), 9 Bom. L. R. 1289.

[4] See *Bishambhar Nath* v. *Sheo Narain* (1906), 29 All. 166; *Gopal Kastur* v. *Amarchand* (1907), 9 Bom. L. R. 1289.

[5] See *Joykisto Cowar* v. *Nittyanund Nundy* (1878), 3 Calc. 738; 2 C. L. R. 440.

[6] *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (1899), 26 Calc. 349, at p. 354; 3 C. W. N. 190, at pp. 192, 193; *Anant Ram* v. *Channu Lal* (1903), 25 All. 378; *Lalji Nensey* v. *Keshowji Punja* (1912), 37 Bom. 340; 14 Bom. L. R. 840.

[7] See *Makhun Lall Dutt* v. *Ramlall Shaw* (1898), 3 C. W. N. 134; *Morrison* v. *Verschoyle* (1901), 6 C. W. N. 429, at p. 458.

[8] *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (1902), 27 Bom. 157; see *Baldeodas* v. *Manekchand* (1901), 3 Bom. L. R. 144.

partnership,[1] but where the coparceners alone are members of the partnership, the death of a member does not dissolve the partnership.[2]

Debts.

Where the manager has contracted debts for a proper joint family purpose, the coparcenary property is liable.[3] The members of the family are liable to the extent of family property which has come to their hands, and if the manager or any other member of the family pays more than his share he can require the others to contribute.[4]

There is no presumption that the action of a manager in contracting debts, etc., is on behalf of the joint family,[5] or that it is within his authority.[6]

Promissory notes.

It has been held that where the manager borrows money in his own name on promissory notes for the purpose of a joint family business, or to meet a joint family necessity, the creditor can recover the money from all the members of the family, although they were not all parties to the notes.[7] It is submitted that no one but a party to a promissory note can be held liable thereunder,[8] although the family may be liable for the debt. Where the note is given in the name of the firm, the partners are liable.[9]

Election by creditor.

Where the manager contracts a debt which is binding not only on the persons executing the contract but on the other members of the joint family to which he belongs, the creditor may elect to treat the debt as a personal debt, and sue the manager personally, or he may sue him as representative of the family,[10] or he may sue the whole family.

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[1] *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (1904), 28 Mad. 344; followed in *Ramanathan Chetty* v. *Yegappa Chetty* (1915), 30 Mad. L. J. 241.

[2] *Raghumall* v. *Luchmondas* (1916), 20 C. W. N. 708.

[3] *Dwarka Nath Chowdhury* v. *Bungshi Chandra Saha* (1905), 9 C. W. N. 879.

[4] See *Bimala Debi (Srimati)* v. *Tarasundari Debi (Srimati)* (1870), 6 B. L. R. App. 101; 14 W. R. C. R. 480; *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya* (1892), 20 Calc. 18; *Baldeo Sonar* v. *Moburak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370.

[5] *Soiru Padmanabh Rangappa* v. *Narayanrao* (1893), 18 Bom. 520; *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (1896), 21 Bom. 808, at p. 815; *Sunkur Pershad* v. *Goury Pershad* (1879), 5 Calc. 321.

[6] See *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725; *Ganpat Rai* v. *Munni Lal* (1911), 34 All. 135.

[7] *Baisnab Chandra De* v. *Ramdhon Dhor* (1906), 11 C. W. N. 139; *Krishna Chettiar* v. *Nagamani Ammal* (1914), 39 Mad. 915. See also *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (1903), 7 C. W. N. 725; *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597.

[8] See per Davies, J., in *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597, at p. 601; *Thaith Ottahil Kutte Ammu* v. *Puroshotam Doss* (1911), 1 Mad. W. N. 45.

[9] *Raghunathji Tarachand* v. *Bank of Bombay* (1909), 34 Bom. 72; 11 Bom. L. R. 255.

[10] *Jumoona Persad Singh* v. *Dignarain Singh* (1883), 10 Calc. 1; 13 C. L. R. 74.

In the first case he can only realize his debt from the share of the manager; [1] in the latter cases he can recover it from the family property.[2]

Although a manager may have power to deal with the coparcenary property,[3] he has no power to bind the other members of the family personally,[4] except in the proper management of a family business.[5]

In the Bombay Presidency there is an express enactment protecting members of joint Hindu families from personal liability for family debts incurred while they were unborn, or before they attained the age of twenty-one years. They are liable after that age for such debts to the extent of family property come to their hands and not duly applied by them.[6]

In the absence of fraud or collusion, the manager can bind the estate by a compromise,[7] or by a reference to arbitration.[8] Compromise.

Where he has been appointed guardian of a minor for the suit, his powers are controlled by the Civil Procedure Code (Act V. of 1908), O. xxxii., r. 7.[9]

He can pay interest on a debt, or can acknowledge one, so as to extend the period of limitation,[10] but he has no power to pay or revive by acknowledgment a debt which is barred by limitation, except as against himself.[11]

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[1] See *post*, p. 283.

[2] See *post*, p. 280.

[3] *Post*, pp. 283 *et seq.*

[4] *Chalamayya* v. *Varadayya* (1898), 22 Mad. 166; *Ranjit Sing* v. *Amullya Prosad Ghose* (1905), 9 C. W. N. 923; cf. *Wagehela Rajsanji* v. *Masludin (Shekh)* (1887), 14 I. A. 89; 11 Bom. 551; *Indur Chunder Singh* v. *Radhakishore Ghose* (1892), 19 I. A. 90; 19 Calc. 507; *Ranmal Singji (Maharana Shri)* v. *Vadilal Vakhatchand* (1894), 20 Bom. 61; *Surendra Nath Sarkar* v. *Atul Chandra Roy* (1907), 34 Calc. 892; *Bhawul Sahu* v. *Baij Nath Pertab Narain Singh* (1907), 12 C. W. N. 256; *Gajindra Narain (Rai)* v. *Harihar Narain (Rai)* (1908), 12 C. W. N. 687. As to minors in Bombay, see Act VII. (Bo. C.) of 1866, s. 5.

[5] *Ante*, pp. 274, 275.

[6] Act VII. (Bo. C.) of 1866, s. 5.

[7] *Pitam Singh* v. *Ujagar Singh* (1878), 1 All. 651; *Ram Kuber Pande* v. *Ram Dasi* (1913), 35 All. 428. As to a family arrangement made by the father, see *Ramdas* v. *Chabildas* (1910), 12 Bom. L. R. 621.

[8] *Jagan Nath* v. *Mannu Lal* (1894), 16 All. 231; *Balaji* v. *Nana* (1903), 5 Bom. L. R. 95.

[9] *Ganesha Row* v. *Tuljaram Row* (1913), 40 I. A. 132; 36 Mad. 295; 17 C. W. N. 765; 15 Bom. L. R. 626.

[10] *Bhasker Tatya Shet* v. *Vijalal Nathu* (1892), 17 Bom. 512; *Chinnaya Nayudu* v. *Gurunatham Chetti* (1881), 5 Mad. 169; *Kumarasami Nadan* v. *Pala Nagappa Chetti* (1878), 1 Mad. 385; *Sarada Charan Chakravarti* v. *Durgaram De Sinha* (1910), 37 Calc. 461; 14 C. W. N. 741; *Har Prosad Das* v. *Harihar Prosad Singh (Bakshi)* (1915), 19 C. W. N. 860. As to the power of a father to bind his son, see *Narayanasami Chetti* v. *Samidas Mudali* (1883), 6 Mad. 293.

[11] *Dalip Singh* v. *Kundan Lal* (1913), 35 All. 207; *Chinnaya Nayudu* v. *Gurunatham Chetti* (1881), 5 Mad. 169; *Dinkar* v. *Appaji* (1894), 20

Fraud.

A coparcener is entitled to have a contract made by the manager without authority or in fraud of the family rescinded.[1]

Arrangements.

A manager has power to make all necessary arrangements as to the mode of enjoyment of the joint property by the coparceners, as to their commensality, and as to their religious duties and observances.[2]

Where a son had taken possession of a portion of the coparcenary property against the will of his father, who was the manager, he was ejected.[3]

Decree against manager.

The members of a family are all bound by a decree obtained *bonâ fide* against the father, or other manager, as such manager,[4] for a debt duly incurred in the management of the property,[5] whether it were or were not charged upon the family property, and by a sale of the family property in pursuance of such decree, or in a suit brought against the manager of a joint family business in respect of such business,[6] or in any suit brought in respect of the family property,[7] although they were not parties to the suit.[8] When they are of age and acquiesce

Bom. 155; *Sobhanadri Appa Rau* v. *Sriramulu* (1893), 17 Mad. 221; *Gopalnarain Mozoomdar* v. *Muddomutty Guptee* (1874), 14 B. L. R. 21.

[1] *Ravji Janardan Sarangpani* v. *Gangadharbhat* (1897), 4 Bom. 29.

[2] *Raghunadha (Sri)* v. *Brozokishoro (Sri)* (1876), 3 I. A. 154, at p. 191; 1 Mad. 69, at p. 81; 25 W. R. C. R. 291, at p. 302. See *Romesh Chunder Bhuttacharjee* v. *Soorjo Coomar Bhuttacharjee* (1866), 5 W. R. C. R. 90.

[3] *Baldeo Das* v. *Sham Lal* (1875), 1 All. 77. This was put upon the ground that the son had no independent dominion.

[4] In *Madhusudan* v. *Bhau* (1912), 15 Bom. L. R. 36, and in *Laxman* v. *Vinayak* (1915), 40 Bom. 329; 18 Bom. L. R. 52, it was suggested that there is a distinction between the case of the family being represented by the father, and the case where it is represented by another manager, and that in the latter case the other members of the family are not bound by the decree.

[5] *Hanmanta* v. *Gopal* (1909), 11 Bom. L. R. 1145.

[6] *Baldeo Sonar* v. *Mobarak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370; *Sheo Pershad Singh* v. *Raj Kumar Lal* (1892), 20 Calc. 453; *Phulchand* v. *Lachmichand* (1882), 4 All. 486; see *ante*, p. 267.

[7] As, for instance, a decree charging the family property with maintenance, *Minakshi* v. *Chinnappa Udayan* (1901), 24 Mad. 689.

[8] *Sheo Shankar Ram* v. *Jaddo Kunwar* (1914), 41 I. A. 216; 36 All. 383; 18 C. W. N. 968; 16 Bom. L. R. 810, affirming *Jaddo Kunwar* v. *Sheo Shankar Ram* (1910), 33 All. 71; *Kunjan Chetti* v. *Sidda Pillai* (1898), 22 Mad. 461; *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (1871), 14 M. I. A. 367, at p. 376; 11 B. L. R. 244, at p. 249; 17 W. R. C. R. 104, at p. 106; *Khiarajmal* v. *Daim* (1904), 32 I. A. 23, at p. 35; 32 Calc. 296, at p. 314; 9 C. W. N. 201, at p. 215; 7 Bom. L. R. 1; *Hari Vithal* v. *Jairam Vithal* (1890), 14 Bom. 597 (doubted in *Madhusudan* v. *Bhau* (1912), 15

in the conduct of the suit by their father, or other manager, the coparceners would the more clearly be bound by the decree.[1]

If a manager, as such [2] (with the acquiescence, express or implied, of the adult members of the family), brings a suit on behalf of the family, and no objection be made by the defendant, a decree can be made; but a defendant may insist that the other members of the family be brought on the record,[3] unless the suit be brought in respect of a contract made by the managers of a family business, and all the persons who contracted with him are parties to the suit.[4]

In *Kashinath Chimnaji* v. *Chimnaji Sadashiv*,[5] Scott, J., sitting on the Original side of the Bombay High Court, said, "As a matter of practice suits are not filed in this Court [6] by managers representing their infant coparceners; the practice is to join all parties interested, but it would seem that even if in the face of the plaint there was an allegation of a sole plaintiff that he sued as manager on behalf of a coparcenary, the minor coparcener would not be bound by proceedings, unless by judicial sale under the decree rights had been created in third parties, and no prejudice were shown to the absent minors."

It has been held that where all the adult members of a joint family appear on the record it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who are not joined in the suit.[7]

Bom. L. R. 36); *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Bissessur Lall Sahoo* v. *Luchmessur Singh* (*Maharajah*) (1879), 6 I. A. 233; 5 C. L. R. 477; *Baldeo Sonar* v. *Mobarak Ali* (1902), 29 Calc. 583; 6 C. W. N. 370; *Ram Sevak Das* v. *Raghubar Rai* (1880), 3 All. 72; *Jeo Lal Singh* v. *Gunga Pershad* (1884), 10 Calc. 996; *Sakharam* v. *Devji* (1898), 23 Bom. 372; *Bhana* v. *Chindhu* (1896), 21 Bom. 616; *Krishnama* v. *Perumal* (1885), 8 Mad. 388; *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1883), 7 Bom. 467; *Gajindar Narain* (*Rai*) v. *Haribai Narain* (*Rai*) (1908), 12 C. W. N. 687; *Magniram* v. *Tukaram* (1900), 2 Bom. L. R. 197. See *Subramaniyayyan* v. *Subramaniyayyan* (1882), 5 Mad. 125; *Laxman* v. *Vinayak* (1915), 40 Bom. 329; 18 Bom. L. R. 52.

[1] See *Kunjan Chetti* v. *Sidda Pillai* (1899), 22 Mad. 461; *Madhusudan* v. *Bhau* (1912), 15 Bom. L. R. 36.

[2] *Girwar Narain Mahton* v. *Makbunessa* (*Mussammat*) (1916), 1 Pat. L. J. 468.

[3] See *Guruvayya Gouda* v. *Dattatraya Anant*, 28 Bom. 11; *Thakurmani Singh* v. *Dai Rani Koeri* (1906), 33 Calc. 1079; *Angamuthu Pillai* v. *Kolandavelu Pillai* (1899), 23 Mad. 190; *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1883), 7 Bom. 467; *ante*, p. 267. See, however, *Vithu Dhondi* v. *Babaji* (1908), 32 Bom. 375; 10 Bom. L. R. 505.

[4] *Ante*, p. 267.

[5] (1906), 30 Bom. 477, at p. 486; 8 Bom. L. R. 268. See, however, *Bissessur Lall Sahoo* v. *Luchmessur Singh* (*Maharajah*) (1879), 6 I. A. 233, at p. 237; 5 C. L. R. 477, at p. 480, and cases *ante*, p. 278, note 8.

[6] The practice is the same on the Original side of the Bengal High Court.

[7] *Krishna Jiva Tewari* v. *Bishnath Kalwar* (1912), 34 All. 615; *Hori Lal* v. *Manman Kunwar* (1912), *Ibid.* 549; *Nathu Lal* v. *Lala* (1912), *Ibid.* 572.

As to parties to suits, see *ante*, p. 267.

All members of a family are bound by decrees in suits brought by the manager of a joint family business as such, even though they are not parties to the suit;[1] but in a suit brought by such manager the defendant may insist upon all the members of the family who are members of the partnership being brought upon the record,[2] except where the suit is brought upon a contract made by the manager in his own name.[3]

Minor members of the family who have not by a consentient act become members of the partnership are not necessary parties to the suit.[4]

Suit on mortgage.

There is a conflict of decisions as to whether, in a suit on a mortgage instituted under the Transfer of Property Act,[5] any but the actual parties are bound.

The decisions deal with mortgages created by the father of a Mitakshara family,[6] but they are equally applicable to a mortgage by any other manager. The cases before the passing of that Act determined that sons who were joint with their father [7] were liable if the suit was brought against their father as representing the family, *i.e.* himself and his sons.[8]

In each case it was a question whether the decree was intended to bind the family, and whether in execution their interests passed by the sale.[9] It did not follow from the mere fact that the interest purporting to be sold was the right title and interest of the father that the entire interest which he had authority to deal with did not pass.[10]

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[1] *Baldeo Sonar* v. *Mobarak Ali Khan* (1902), 29 Calc. 583; 6 C. W. N. 370; *ante*, p. 267. See *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1, where it was held that the dismissal of a suit for redemption brought by the father did not bar the sons.

[2] *Shamrathi Singh* v. *Kishan Prasad* (1907), 29 All. 311. See *Alagappa Chetti* v. *Vellian Chetti* (1894), 18 Mad. 33; *Lutchmanen Chetty* v. *Sivaprokasa Modeliar* (1899), 26 Calc. 349; 3 C. W. N. 190; *ante*, p. 267.

[3] *Ante*, p. 267.

[4] *Lutchmanen Chetty* v. *Sivaprokasa Modeliar* (1899), 26 Calc. 349; 3 C. W. N. 190.

[5] IV. of 1882.

[6] *Post*, p. 281.

[7] See *Trimbak Balkrishna* v. *Narayan Damodhar Dabholkar* (1884), 8 Bom. 481.

[8] *Ponnappa Pillai* v. *Pappuvayangar* (1881), 4 Mad. 1; S. C. (1885), 9 Mad. 343; *Srinivasa Nayudu* v. *Yelaya Nayudu* (1882), 5 Mad. 251; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520; *Studd* v. *Brij Nundun Pershad Singh* (1881), 9 C. L. R. 350; *Sundraraja Ayyangar* v. *Jaganada Pillai* (1881), 4 Mad. 111; *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Deva Singh* v. *Rai Manohar* (1880), 2 All. 746; *Ram Sevak Das* v. *Raghubar Rai* (1880), 3 All. 72; *Gayadin* v. *Raj Bansi Kuar* (1880), 3 All. 191; *Ram Narain Lal* v. *Bhawani Prasad* (1881), 3 All. 443; *Parsidh Narain Singh* v. *Hunoman Sahai* (1881), 11 C. L. R. 263.

[9] See *Pemraj Chandra Bhau* v. *Savalya Gajaba* (1890), 15 Bom. 293; *Doulut Ram* v. *Mehr Chand* (1887), 14 I. A. 187; 15 Calc. 70; *Ram Narain Lal* v. *Bhawani Prasad* (1881), 3 All. 443.

[10] See *post*, pp. 319, 320. *Mahabir Pershad (Rai Babu)* v. *Markunda Nath Sahai (Rai)* (1889), 17 I. A. 11, at p. 16; S. C. *nomine Mahabir Pershad* v. *Moheswar Nath Sahai*, 17 Calc. 584, at p. 589; *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717; *Trimbak Balkrisna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481, at p. 486; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 15; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L.

If, however, the decree from the form of the suit, the character of the debt recovered by it and its terms was to be interpreted as a decree against the father alone and personal to himself, and all that was put up and sold thereunder in execution was his right and interest in the joint ancestral estate, then the auction purchaser acquired no more than that right and interest, *i.e.* the right to demand partition.[1]

Where the mortgage charged the whole interests, the form of mortgage decree now adopted by the Indian Courts would be sufficient to cause a sale of all of such interest.[2]

Section 85 of the Transfer of Property Act enacted as follows:

Suits for Foreclosure, Sale, or Redemption.

"Subject to the provisions of the Code of Civil Procedure, sec. 437,[3] all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

Where there is no such notice the manager can be taken as representing the others.[4]

The Bengal High Court [5] has held that, where the plaintiff had notice of their existence,[6] the sons can sue to set aside a decree to which they are not parties. In the Allahabad High Court earlier decisions,[7] and the latest decision [8] differ from the Bengal view, but there is a decision to the contrary.[9] The Allahabad Court has declined to extend the principle of the Bengal decisions to cases where the property has been sold to a purchaser other than the judgment creditor.[10] The result of the Bengal view would be that a new suit against the sons is necessary, and in such new suit the debt can be recovered by sale of the coparcenary property.[11]

R. 104; *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (1882), 6 Bom. 520; *Gnanammal* v. *Muthusami* (1889), 13 Mad. 47. In *Nanhak Joti* v. *Jaimangal Chaubey* (1880), 3 All. 294, the sale was expressly limited to the father's interest. See cases, *post*, p. 319, notes 6, 7.

[1] *Basa Mal* v. *Maharaj Singh* (1886), 8 All. 205; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77; 14 Calc. 572.

[2] See Act V. of 1908, Sched. I., App. D. 4.

[3] That section dealt with suits concerning property vested in a trustee, executor, or administrator, and has therefore no application to the present question.

[4] *Sheo Shankar Ram* v. *Jaddo Kunwar* (1914), 41 I. A. 216; 36 All. 383; 18 C. W. N. 968; 16 Bom. L. R. 810; *Balki Mahapatra* v. *Brojobasi Panda* (1912), 16 C. W. N. 1019; *Ram Taran Goswami* v. *Rameswar Malia* (1907), 11 C. W. N. 1078.

[5] *Suraj Prosad (Lala)* v. *Golab Chand* (1901), 28 Calc. 517; 5 C. W. N. 640; reversing decision of Ghose, J. (1900), 27 Calc. 724; 4 C. W. N. 701.

[6] The burden of proving this is upon the sons: *Ram Nath Rai* v. *Lachman Rai* (1899), 21 All. 193.

[7] See cases referred to in *Bulwant Singh* v. *Aman Singh* (1910), 33 All. 7.

[8] *Bulwant Singh* v. *Aman Singh* (1910), 33 All. 7.

[9] *Ram Prasad* v. *Man Mohun* (1908), 30 All. 257.

[10] *Debi Singh* v. *Jia Ram* (1902), 25 All. 214; *Lal Singh* v. *Pulandar Singh* (1905), 28 All. 182.

[11] *Dharam Singh* v. *Angal Lal* (1899), 21 All. 301; *Lachhman Das* v. *Dallu* (1900), 22 All. 394. See *Ram Singh* v. *Sobha Ram* (1907), 29 All. 544. In *Suraj Prosad (Lala)* v. *Golab Chand* (1901), 28 Calc. 517; 5 C. W. N. 640; and *Kanhaia Lal* v. *Raj Bahadur* (1902), 24 All. 211, the son in the suit brought by him had an

The Madras[1] and Bombay[2] High Courts consider that the law in this respect was not altered by the Transfer of Property Act.

A decree on a mortgage is equally binding when the manager happens to have been appointed as guardian by the Court, but has obtained no sanction from the Court.[3]

An appeal by the manager as representative of the family is on the same footing as a suit brought by him.[4]

When a suit on a mortgage or other contract has been brought against the manager, it has been held that there is nothing to prevent another suit against the other members of the family on the same cause of action.[5]

The present law on the subject is to be found in Schedule I., Order XXXIV., rule 1 of the Civil Procedure Code (Act V. of 1908) which is as follows :—

"Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

This does not completely clear up the difficulties created by the decisions under section 85 of the Transfer of Property Act,[6] but it is submitted that, as all the coparceners have an interest in the right of redemption, they should be made parties.[7]

The Allahabad High Court,[8] and the Patna High Court,[9] have, however, in cases to which Act V. of 1908 applies, held that a suit on a mortgage by or against the manager binds the other members of the family.

The Calcutta High Court has declined to follow the Allahabad case, and holds that all the coparceners must be parties.[10]

Vesting order. A coparcener is not bound by a vesting order made under the Insolvency law, unless he was himself declared an insolvent.[11]

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opportunity of contesting the mortgage, so the Court declined to give him any remedy, except a right to redeem.

[1] *Ramasamayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222; *Palani Goundan* v. *Rangayya Goundan* (1898), 22 Mad. 207.

[2] *Ramkrishna* v. *Vinayak Narayan* (1910), 34 Bom. 354; 12 Bom. L. R. 219; *Chimna* v. *Sada* (1910), 12 Bom. L. R. 811; *Tatyarao* v. *Puttapa* (1910), 12 Bom. L. R. 940.

[3] *Ram Avtar Singh* v. *Nursing Narain Singh*, 3 C. L. J. 12. See *Gharib-ul-lah* v. *Khalak Singh* (1903), 30 I. A. 165; 25 All. 407; 7 C. W. N. 681; 5 Bom. L. R. 478. Cf. *post*, p. 287.

[4] See *Jutadhari Lal* v. *Rughoobeer Persad* (1883), 9 Calc. 508; 12 C. L.R. 255.

[5] *Muhammad Askari* v. *Radhe Ram Singh* (1900), 22 All. 307.

[6] *Ante*, pp. 281, 282.

[7] See *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 342, at p. 354.

[8] *Hori Lal* v. *Munman Kunwar* (1912), 34 All. 549 (a case of sons being represented by their father); *Madan Lal* v. *Kishan Singh* (1912), *Ibid.* 572 (Do.); *Ram Kuber Pande* v. *Ram Dasi* (1913), 35 All. 428 (Do.); *Krishna Jiva Tewari* v. *Bishnath Kalwar* (1912), 34 All. 615 (a case of a minor brother being represented by his brothers.)

[9] *Raghunandan Singh* v. *Parmeshur Dyal Singh* (1917), 2 Pat. L. J. 306.

[10] *Debi Prosad Sahi* v. *Dharamjit Narayan Singh* (1914), 41 Calc. 727.

[11] See *Nunna Setti* v. *Chidaraboyina* (1902), 26 Mad. 214.

Personal decree.

A decree, even for a joint family debt, in a suit by or against the manager alone, and not as representing the family, does not bind his coparceners,[1] and cannot be executed against the coparcenary property.[2] If a sale takes place in execution of such decree the interest of the defendant alone passes thereby.[3]

ALIENATION AND CHARGE.

Alienation by coparcenary.

Where all the coparceners are adults they can together effect a valid sale or charge of the coparcenary property.[4] A sale or charge can also be made by the adult coparceners, and the manager acting on behalf of the minor coparceners in case of necessity.[5]

Alienation by manager.

A manager can alienate or charge the family property with the express or implied consent of all the then existing adult coparceners, so as to bind them.[6]

It has been held that ratification is merely evidence of necessity,[7] but it is submitted that ratification is equivalent to consent,[8] whether there be necessity or not.

It is unsettled whether a manager can, even in the case of necessity,[9] alienate the family estate, so far as adult coparceners are concerned, without their assent, either express or implied.

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[1] See *Sundar Lal* v. *Chhitar Mal* (1906), 29 All. 1; S. C. *Ibid.*, p. 215.

[2] *Dwarka Nath Chowdhury* v. *Bungshi Chandra Saha* (1905), 9 C. W. N. 879.

[3] *Armugam Pillai* v. *Sabapathi Padiachi* (1882), 5 Mad. 12; *Subramaniyayyan* v. *Subramaniyayyan* (1882), 5 Mad. 125; *Viraragavamma* v. *Sanundrala* (1885), 8 Mad. 208; followed in *Abilak Roy* v. *Rubbi Roy* (1885), 11 Calc. 293; *Guruvappa* v. *Thimma* (1887), 10 Mad. 316; *Maruti Narayan* v. *Lilachand* (1882), 6 Bom. 564; *Kisansing Jivansing Pardesi* v. *Moreshwar Vishnu Joshi* (1882), 7 Bom. 91; *Dasaradhi Ravulo* v. *Joddumoni Ravulo* (1882), 5 Mad. 193; *Babaji* v. *Dhuri* (1884), 9 Bom. 305. See *post*, pp. 319, 320.

[4] *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 94; 20 W. R. C. R. 192, at p. 194.

[5] *Post*, pp. 285 *et seq.*

[6] *Gharibullah* v. *Khalak Singh* (1903), 30 I. A. 165, at p. 169; 25 All. 407, at p. 415; 7 C. W. N. 681, at p. 687; 5 Bom. L. R. 478; *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389; *Buraik Chuttur Singh* v. *Greedharee Singh* (1868), 9 W. R. C. R. 337; *Chhotiram* v. *Narayandas* (1887), 11 Bom. 605; see *post*, p. 306; *Kandasami Asari* v. *Somaskanda Ela Nidhi* (1910), 35 Mad. 177, at p. 181.

[7] *Kandasami Asari* v. *Somaskanda Ela Nidhi* (1910), 35 Mad. 177.

[8] *Gangabai* v. *Vamanaji A. Datar* (1864), 2 Bom. H. C. 301. Acquiescence shown by receiving the benefit of the purchase-money, with knowledge of the facts, amounts to a ratification, *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018, at p. 1020; 9 W. R. C. R. 511; *White* v. *Bishto Chunder Bose* (1863), 2 Hay, 567. See *post*, p. 306.

[9] As to what amounts to necessity, see *post*, pp. 288–290.

The decisions are in conflict.[1] The texts of the Mitakshara [2] upon which the law on the subject is based do not extend to such a case.

It is submitted that in case of necessity [3] the consent may be presumed,[4] but that where there is an express dissent, of which the purchaser had notice, or which he had means of knowing, there can be no valid sale or charge.

As to the powers of a father in a family governed by the Mitakshara law, to sell or charge the property to pay his debts, see *post*, pp. 308, 309.

Where the parties intend that all the coparceners should execute the transfer, the document does not take effect by reason only that the managing member has signed it, and that there is a recital of necessity.[5]

Where there is neither consent nor necessity, a manager other than the father cannot alienate the family property by sale, mortgage, gift, permanent lease,[6] or otherwise.

Gift by father. Under the Mitakshara law, a father can make a gift of a small portion of the movable coparcenary property for pious purposes, or as a gift of affection, *i.e.* to a child or other near relative.[7] He may devote a portion of the family property to a dowry for a daughter,[8] and can also devote a small portion of

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[1] In *Phul Chand* v. *Man Singh* (1882), 4 All. 309; *Bishambhur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96, and *Juggurnath Khootia* v. *Doobo Misser* (1870), 14 W. R. C. R. 80, the power was affirmed. See also *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 18; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. R. 31, at p. 45; 12 W. R. F. B. R. 1, at p. 8; *Bunsee Lall* v. *Aoladh Ahsan (Shaikh)* (1874), 22 W. R. C. R. 552. See "Dayabhaga," chap. ii. para. 26; Strange's "Hindu Law," vol. ii. p. 348. It was held in *Deotaree Mahapattur* v. *Damoodhur Mahapattur*, Ben. S. D. A. 1859, p. 1643, that the principles of *Hunooman Persaud Panday's* case (*post*, p. 286) govern all cases of alienation by persons holding limited estates. *Contrâ Muthoora Koonwaree* v. *Bootun Singh* (1870), 13 W. R. C. R. 30; *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389, at p. 399. See *Upooroop Tewary* v. *Bandhjee Suhoy* (1881), 6 Calc. 749, at p. 753; 6 C. L. R. 192, at p. 196; Strange's "Hindu Law," vol. i. p. 20.

[2] Chap. i. s. 1, paras. 28, 29.

[3] *Post*, pp. 288–290

[4] See *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389, at p. 399; *Chhotiram* v. *Narayandas* (1887), 11 Bom. 605; K. K. Bhattacharya's "Joint Hindu Family," pp. 487, 488.

[5] *Sivasami Chetti* v. *Sevugan Chetti* (1901), 25 Mad. 389.

[6] *Ram Ratan* v. *Lachman Das* (1908), 30 All. 460; *Sheikh Chand* v. *Hiralal* (1907), 9 Bom. L. R. 114; *Narayan* v. *Political Agent Sawantwadi* (1905), 7 Bom. L. R. 172; *Sataram Pandit (Shri)* v. *Harihar Pandit (Shri)* (1910), 12 Bom. L. R. 910; *Brojomohun Ghose* v. *Luchmun Singh Thakoor*, W. R. 1864, C. R. 83; *Oahud Buksh (Cazee)* v. *Bindoo Bashinee Dossee* (1867), 7 W. R. C. R. 298.

[7] *Bachoo Harkisondas* v. *Mankorebai* (1904), 29 Bom. 51; 6 Bom. L. R. 268, affirmed on appeal (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646; *Kamakshi Ammal* v. *Chakrapany Chettiar* (1907), 30 Mad. 452. See *Hanmantapa* v. *Jivubai* (1900), 24 Bom. 547; 2 Bom. L. R. 478.

[8] *Kudutamma* v. *Narasimhacharyalu* (1907), 17 Mad. L. J. 528, referred to in *Churaman Sahu* v. *Gopi Sahu* (1909), 13 C. W. N. 994, at p. 999;

the immovable property to pious purposes,[1] but not for any other purpose.[2] He cannot do so by will.[3]

Movables. There is some authority that, even under the Mitakshara law, a father has complete power of disposition over ancestral movables,[4] but it is submitted that he has no greater power over movables than he has over immovable property,[5] except so far as may be necessary from the nature of the property.

Powers of father. With these exceptions, and except so far as he has power to alienate the property for payment of his debts,[6] the powers of the father over coparcenary property are not in law greater than those of any other manager.[7]

The father cannot give family property to one son in preference to the others.[8]

Having regard to his position, greater deference will necessarily be paid to his wishes than in the case of any other manager.[9]

In case of necessity,[10] the father or other manager[11] can

Sundaramayya v. *Sitamma* (1911), 35 Mad. 628; *Narayana* v. *Ramalinga* (1915), 39 Mad. 587. See *Sivananañja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (1866), 3 Mad. H. C. 75.

[1] See *Raghunath Prasad* v. *Gobind Prasad* (1885), 8 All. 76; *Gopal Chand Pande* v. *Kunwar Singh* (*Babu*) (1830), 5 Ben. Sel. R. 24 (new edition, 29). "Mitakshara," chap. i. s. 1, para. 28.

[2] *Rayakkal* v. *Subbanna* (1892), 16 Mad. 84; *Baba* v. *Timma* (1883), 7 Mad. 357; *Ganga Bisheshar* v. *Pirthi Pal* (1880), 2 All. 635; *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162; *Bala* v. *Balaji* (1897), 22 Bom. 825; *Pratabnarayan Das* v. *Court of Wards* (1869), 3 B. L. R. (A. J.) 21; 11 W. R. C. R. 343.

[3] *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353.

[4] See *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 47; *Nallatambi Chetti* (*Rayadur*) v. *Mukunda Chetti* (*Rayadur*) (1868), 3 Mad. H. C. 455, at p. 456; *Shib Dayee* v. *Doorga Pershad* (1872), 4 N. W. P. 63, at p. 70. "Mitakshara," chap. i. s. 1, paras. 21, 24.

[5] See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; S. C. in Court below (1876), 1 Bom. 561.

[6] *Post*, pp. 308, 309.

[7] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 100, 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Chinnaya* v. *Perumal* (1889), 13 Mad. 51; *Palanivelappa Kaundan* v. *Mannaru Naikan* (1865), 2 Mad. H. C. 416; *Shudanund Mohapattur* v. *Bonomalee Doss Mohapattur* (1866), 6 W. R. C. R. 256, at p. 261; *Ningareddi* v. *Lakshmawa* (1901), 26 Bom. 163, at p. 166; 3 Bom. L. R. 647. An agreement amounting *pro tanto* to an alienation without consideration was set aside in *Bala* v. *Balaji* (1897), 22 Bom. 825.

[8] *Nand Ram* v. *Mangal Sen* (1909), 31 All. 359.

[9] See R. C. Mitra's "Law of Joint Property," 2nd ed., pp. 73, 74.

[10] *Post*, pp. 288–290.

[11] The fact of his acting as manager is sufficient, although he may not be strictly entitled so to act. *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 413; 18 W. R. C. R. note to p. 81. See also *Gunga Pershad* v. *Phool Singh* (1868), 10 W. R. C. R. 106; 10 B. L. R., note to p. 368;

bind the interest of a minor coparcener by a sale or charge.[1] Apparently he can in such case also bind the interest of an adult coparcener who does not dissent.[2]

This principle was laid down in the leading case of *Hunooman Persaud Panday* v. *Munraj Koonweree (Mussamut Babooee)* [3] with regard to the manager for an infant heir. It has been applied to the managers of joint families acting on behalf of infant coparceners,[4] to widows and daughters inheriting property from their husbands and fathers,[5] to women inheriting as widows of *gotraja sapindas,*[6] to the managers of religious endowments,[7] to managers on behalf of lunatics,[8] and to the holders of impartible estates, which are inalienable by custom.[9]

Benefit apart from necessity.

In that case it was said that the power "can only be exercised rightly in a case of need or for the benefit of the estate." Of the large number of cases in which the principles contained in *Hunooman Persaud Panday's* [10] case have been applied, there is not, so far as the writer is aware, any one in which a sale or charge has been justified by benefit apart from necessity, except the recent case of *Krishna Chandra Chowdury* v. *Ratan Ram Pal* (1915), 20 C. W. N. 645, and the case of *Ratnam* v. *Govindarajulu,*[11] where the money was originally raised for, amongst other purposes, enlarging the family dwelling-house, but in that case, as the debt in question was raised for the purpose of paying an antecedent debt, the question as to the original loan did not really arise (see *post,* p. 288). Apart from necessity, it is not easy to say what is for the benefit of the estate.[12] It is clearly not intended that this

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Sheo Shankar Gir v. *Ram Shewak Chowdhri* (1896), 24 Calc. 77.

[1] *Ram Charan* v. *Mihin Lal* (1914), 36 All. 158. No distinction can be drawn between the power to charge and the power to sell. The need which would justify the exercise of the one power would justify the exercise of the other. *Mohanund Mondul* v. *Nafur Mondul* (1899), 26 Calc. 820; 3 C. W. N. 770.

[2] *Ante,* p. 284.

[3] (1856), 6. M. I. A. 393; 18 W. R. C. R. note to p. 81.

[4] *Soorendro Pershad Dobey* v. *Nundun Misser* (1874), 21 W. R. C. R. 196; *Tandavaraya Mudali* v. *Valli Ammal* (1863), 1 Mad. H. C. 398; *Deotaree Mahapattur* v. *Damoodhur Mahapattur,* Ben. S. D. A. 1859, p. 1643.

[5] *Kameswar Pershad (Baboo)* v. *Run Bahadoor Singh* (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; *Amarnath Sah (Lala)* v. *Achan Kuar (Rani)* (1892), 19 I. A. 196; 14 All. 420; *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 766.

[6] *Post,* p. 468.

[7] *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (1896), 24 Calc. 77; *Doorganath Roy (Koonwur)* v. *Ram Chunder Sen* (1876), 4 I. A. 52, at p. 63; 2 Calc. 341, at p. 351.

[8] *Gourcenath* v. *Collector of Monghyr* (1867), 7 W. R. C. R. 5

[9] *Gopal Prosad Bhakat* v. *Raghunath Deb* (1904), 32 Calc. 158; 9 C. W. N. 330. As to polygars, see *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145. As to the powers of the karnavan of a tarwad, see *Kalliyani* v. *Narayana* (1885), 9 Mad. 266; *Kanna Pisharodi* v. *Kombi Achen* (1885), 8 Mad. 381; *Elayachandidathil Kombi Achen* v. *Kenatumkora Lakshmi Amma* (1882), 5 Mad. 201. As to the alienation of impartible estates which are not inalienable by custom, see *ante,* pp. 264, 265.

[10] 6 M. I. A., at p. 423; 18 W. R. note to p. 81.

[11] (1877), 2 Mad. 339.

[12] See *Palaniappa Chetty* v. *Deivasikamany Pandara* (1917), 44 I. A. 147; 21 C. W. N. 729; 19 Bom. L. R. 587.

power should authorize a sale or charge for the purpose only of increasing the immediate income of the estate.[1]

In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[2] the Judicial Committee said the authority of the manager to alienate the property would be implied "if it can be shown that the alienation was made for legitimate family purposes," but there is nothing in the case to show that they intended that expression to extend beyond a case of necessity.

Manager having powers given by Court.

When the manager of a joint family is acting under the authority of a Court, as when he has been appointed a guardian under Act VIII. of 1890,[3] or is acting as administrator under the Probate and Administration Act,[4] or as guardian for a suit,[5] his powers are limited by the provisions of the Acts under the authority of which he has received an appointment; but as in the case of a family governed by the Mitakshara school of law a guardian cannot be appointed of the interest of a minor in coparcenary property,[6] where such appointment has been made it will not interfere with his powers as manager under Hindu Law.[7]

Matters to be regarded.

"Where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the state, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped

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[1] See *Radha Pershad Singh* v. *Talook Raj Kooer (Mussamut)* (1873), 20 W. R. C. R. 38; *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. H. C. 4.

[2] (1879), 6 I. A. 88, at p. 101; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233. See *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 342, at p. 350. This was a case of a mortgage by a father for necessary purposes.

[3] See *Shurrut Chunder* v. *Rajkissen Mookerjee* (1875), 15 B. L. R. 350; 24 W. R. C. R. 46. In *Tejpal* v. *Ganga* (1902), 25 All. 59, following *Girraj Bakhsh* v. *Hamid Ali (Kazi)* (1886), 9 All. 340 (a case under Act XL. of 1858), it was held that there being no sanction, the guardian was relegated to the powers he would have had, if he had not been appointed by the Court. The High Court of Bengal has taken a different view in *Bhupendro Narayan Dutt* v. *Nemye Chand Mondul* (1888), 15 Calc. 627, at p. 636, and *Shurrut Chunder* v. *Rajkissen Mookerjee* (1875), 15 B. L. R. 350; 24 W. R. C. R. 46; and it is submitted that the express terms of Act VIII. of 1890, s. 29, make this question clear. See *Sinaya Pillai* v. *Munisami* (1899), 22 Mad. 289; *Anpurnabai* v. *Durgapa Mahalapa Naik* (1894), 20 Bom. 150.

[4] See *Ranjit Sing* v. *Amullya Prosad Ghose* (1905), 9 C. W. N. 923.

[5] *Ganesha Row* v. *Tuljaram Row* (1913), 40 I. A. 132; 37 Mad. 295; 17 C. W. N. 765; 15 Bom. L. R. 626.

[6] *Ante*, p. 270.

[7] *Gharibullah* v. *Khalak Singh* (1903), 30 I. A. 165; 26 All. 407; 7 C. W. N. 681; 5 Bom. L. R. 478; *Ram Avtar Singh* v. *Nursing Narain Singh*, 3 C. L. J. 12.

to cause. Therefore, the lender . . . unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt." [1]

What amounts to necessity.

All circumstances of pressure which render the raising of money necessary for the protection or preservation of the estate, or for the personal well-being of the coparceners, would support a sale or charge.

Baboo K. K. Bhattacharya, in his "Law of the Joint Hindu Family," [2] says, "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives, these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities."

The following are proper objects for the raising of money :—

(*a*) The payment of Government revenue or of other debts which are payable out of the estate.[3]

The debts of the father or other person through whom the property has been acquired by inheritance, will, or gift, must be paid, provided they are such as to bind the estate,[4] and therefore the payment of them constitutes a sufficient necessity for sale or mortgage,[5] although no suit may have been instituted for the purpose of recovering them.[6] Where there is a decree the necessity is the more pressing.[7]

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[1] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 423; 18 W. R. C. R., note to p. 81.

[2] Page 488.

[3] Macnaghten's "Hindu Law," vol. ii. chap. xi. case 2, p. 293. *Gooroopersaud Jena* v. *Muddunmohun Soor*, Ben. S. D. A. Rep., 1856, p. 980; *Bishambur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96; *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753. As to the debts of an ancestral business, see *Sakrabai Nathubai* v. *Maganlal Mulchand* (1901), 26 Bom. 206; 3 Bom. L. R. 738.

[4] Debts barred by limitation do not justify an alienation by the manager, *Melgirappa* v. *Shivappa* (1869), 6 Bom. H. C. 270; *Dinkar* v. *Appaji* (1894), 20 Bom. 155. See *Chinnaya Nayudu* v. *Gurunatham Chetti* (1882), 5 Mad. 169. As to the power of a widow to pay debts barred by limitation, see *post*, p. 482.

[5] See Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6. Act VII. (Bo. C.) of 1866, s. 5. *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52; *Soorjoo Pershad* v. *Krishan Pertab* (*Rajah*) (1869), 1 N. W. P. H. C. Rep. 46.

[6] *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. 5.

[7] See *Purmessur Ojha* v. *Goolbee* (*Mussamut*) (1869), 11 W. R. C. R. 446; *Sheoraj Kooer* v. *Nuckchedee Lall* (1870), 14 W. R. C. R. 72.

According to Hindu law, the payment of a father's debts, even in his lifetime, is a pious duty on the part of a son,[1] provided that they have not been incurred for illegal or immoral purposes. In the case of a family governed by the Mitakshara school of Hindu law, the discharge of such debt is therefore such a necessary purpose as to give validity to a sale or mortgage of ancestral property by the father,[2] or after his death,[3] by the manager, whether the sons be minors or adults, provided that the debt has not been incurred for illegal or immoral purposes.

The satisfaction of a decree for pre-emption in a suit by the father has been held to justify a mortgage.[4] The recovery of property which had been sold for arrears of road cess, has been held not to justify a mortgage.[5]

(*b*) The maintenance of the coparceners and of the persons whom they are legally or morally bound to maintain.[6]

(*c*) The reasonable marriage expenses[7] of the male[8] and female[9] members of the family.

The Allahabad High Court, while holding that a first marriage may be necessary, declines to extend the rule in every case to a second marriage.[10]

In a case governed by the Bengal law the sale of a share would, it is submitted, be justified. It is submitted that under both schools the sale of separate property would be justified.[11]

(*d*) The performance of an indispensable religious duty,[12] such as the initiatory ceremony of a member of the family,[13]

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[1] See *post*, pp. 308, 309.

[2] See *post*, pp. 308, 309.

[3] *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131; S. C. *Gunga Pershad* v. *Sheodyal Singh*, 9 C. L. R. 417.

[4] *Nathu* v. *Kundan Lall* (1910), 33 All. 242.

[5] *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753.

[6] *Makundi* v. *Sarabsukh* (1884), 6 All. 417, at p. 421; *Bishambur Naik* v. *Sudasheeb Mohapatter* (1864), 1 W. R. C. R. 96. As to the right to maintenance, see *ante*, pp. 234, 235, 271.

[7] This includes money paid for the bride in an *asura* marriage; *Bhagirathi* v. *Jokhu Ram Upadhia* (1910), 32 All. 575; see *ante*, pp. 51, 52.

[8] *Kameswari Sastri* v. *Veeracharlu* (1910), 34 Mad. 422; *Gopala Krishnam* v. *Venkatanarasa* (1912), 37 Mad. 273, overrruling *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1903), 27 Mad. 206; *Sundrabai* v. *Shivnorayana* (1907), 32 Bom. 81; 9 Bom. L. R. 1366; *Narayana* v. *Ramalinga* (1915), 39 Mad. 587.

[9] *Preaj Nurain* v. *Ajodhyapurshad* (1848), 7 Ben. Sel. Rep. 513 (2nd ed., 602); *Gunput Lall* (*Lalla*) v. *Toorun Koonwar* (*Mussamut*) (1871), 16 W. R. C. R. 52.

[10] *Bhagirathi* v. *Jokhu Ram Upadhia* (1910), 32 All. 575.

[11] *Juggessur Sircar* v. *Nilambur Biswas* (1865), 3 W. R. C. R. 217. See *Makundi* v. *Sarabsukh* (1884), 6 All. 417, at p. 420; *Bhoorun Koer* (*Mussamut*) v. *Sahebzadee* (1866), 6 W. R. C. R. 149.

[12] As to pilgrimages, see *Mutteeram Kowar* v. *Gopaul Sahoo* (1873), 11 B. L. R. 416.

[13] Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6, p. 296.

the funeral ceremonies[1] or *sradh* of a member of the family or of the widow of a member,[2] or a debt incurred on account of such expenditure.[3]

(*e*) Necessary legal expenses for the purpose of preserving or recovering or defending the estate,[4] or of defending a member of the family.[5]

Recital of necessity.

The instrument effecting a sale or creating a charge need not contain any recital of necessity,[6] but it is always better to insert such recital therein.

Discretion of manager.

In determining whether a sale or mortgage for a family necessity is justifiable, a reasonable latitude must be allowed for the exercise of the manager's judgment, especially in the case of a father or of a manager of a trading family, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor has an interest in the property.[7]

Manager may sell to repay money borrowed on personal credit.

The circumstance that to meet the necessities of his ward the manager has pledged his personal credit, does not disentitle him to charge or sell the property,[8] but he can only charge or sell it for the purpose of paying money which the minor was under an obligation to pay.[9]

Purchaser or mortgagee bound to inquire as to necessity.

A person lending money on the security of coparcenary property, or of the property of a minor, or buying that property, is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,[10] and must satisfy himself as

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[1] *Gunput Lall (Lalla)* v. *Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R. 52; *Nathuram* v. *Shoma Chhagan* (1890), 14 Bom. 562.

[2] *Sukeenath Banoo* v. *Huro Churn Buruj* (1886), 6 W. R. C. R. 34; *Gunput Lall (Lalla)* v. *Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R. 52; *Srimohun Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753. See Macnaghten's "Hindu Law," vol. ii. chap. xi. case 6, p. 296 (1818); *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450.

[3] *Gunput Lall (Lalla)* v. *Toorun Koonwar (Mussamut)* (1871), 16 W. R. C. R. 52.

[4] *Gunga Pershad* v. *Phool Singh* (1868), 10 W. R. C. R. 106; 10 B. L. R., note to p. 368; see *Karimuddin (Munshi)* v. *Gobind Krishna Narain (Kunwar)* (1909), 36 I. A. 138; 31 All. 497; 13 C. W. N. 1117; 11 Bom. L. R. 911.

[5] *Beni Ram* v. *Man Singh* (1911), 34 All. 4. See, however, *Nathu Rai* v. *Dindayal Rai* (1917), 2 Pat. L. J. 166.

[6] *Woomesh Chunder Sircar* v. *Digumburee Dossee* (1865), 3 W. R. C. R. 154.

[7] *Babaji Mahadaji* v. *Krishnaji Devji* (1878), 2 Bom. 666; *Ratnam* v. *Govindarajulu* (1877), 2 Mad. 339, at p. 341.

[8] *Succaram Morarji* v. *Kalidas Kallianji* (1894), 18 Bom. 631, at p. 635.

[9] *Ranmalsingji (Maharana Shri)* v. *Vadilal Vakhatchand* (1894), 20 Bom. 61.

[10] *Gour Pershad Narain* v. *Sheo Pershad Ram* (1866), 5 W. R. C. R.

well as he can,[1] and as an honest man,[2] with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,[3] and that circumstances of necessity had occurred which, under the Hindu law, would justify the sale of the property,[4] or a charge upon it at the rate of interest arranged for in the particular instance.[5]

Current account.

In the case of a long series of borrowings it is not always possible to prove exactly the purpose for which any particular item was borrowed. "It will . . . be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects." [6]

Judgment debt.

Where the necessity arises from the pressure of a judgment debt, the person dealing with the manager is entitled to treat the judgment as *primâ facie* proof of necessity." [7]

Alienation authorized by Court.

Where the manager is authorized by the Court to sell or pledge under secs. 28 or 29 of the Guardians and Wards Act,[8] or sec. 90 of the Probate and Administration Act,[9] or under the powers possessed by the High Courts, a *bonâ fide* purchaser or mortgagee need not investigate behind the order of authority.[10]

103; *Lootf Hossein (Syud)* v. *Dursun Lall Sahoo* (1875), 23 W. R. C. R. 424; *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. 169; *Mandil Dass* v. *Megh Narain Dubey* (1916), 1 Pat. L. J. 39.

[1] *Muthoora Doss* v. *Kanoo Beharee Singh* (1874), 21 W. R. C. R. 287; *Dalibai* v. *Gopibai* (1902), 26 Bom. 433; 4 Bom. L. R. 105.

[2] *Looloo Singh* v. *Rajendur Laha* (1867), 8 W. R. C. R. 364; *Runnoo Pandey* v. *Buksh Ali* (1871), 3 N. W. P. 2. See Act IV. of 1882, s. 38; *Jamsetji N. Tata* v. *Kashinath Jivan Manglia* (1901), 26 Bom. 326; 3 Bom. L. R. 898.

[3] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393; 18 W. R. C. R., note to p. 81; *Bunseedhur* (*Lalla*) v. *Bindeseree Dutt Singh* (*Koonwur*) (1866), 10 M. I. A. 454, at p. 471; 1 Ind. Jur. N. S. 165; *Trimbuck Anunt* v. *Gopallshet* (1863), 1 Bom. H. C. (2nd ed.) 27.

[4] *Kasheenath Bose* v. *Chunder Mohun Nundee*, Ben. S. D. A. 1858, p. 1791; *Nowruttun Kooer* (*Mussamut*) v. *Gouree Dutt Singh* (*Baboo*) (1866), 6 W. R. C. R. 193.

[5] See *Hurronath Roy Bahadoor* (*Rajah*) v. *Rundhir Singh* (1890), 18 I. A. 1; 18 Calc. 311.

[6] *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (1896), 21 Bom. 808, at p. 815.

[7] See *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 334; 14 B. L. R. 187, at p. 199; 22 W. R. C. R. 56; *Bhowna* (*Mussamut*) v. *Roop Kishore* (1873), 5 N. W. P. H. C. Rep. 89; *Sheoraj Kooer* v. *Nuckchedee Lall* (1870), 14 W. R. C. R. 72. See, however, *Lootf Hossein* (*Syud*) v. *Dursun Lall Sahoo* (1874), 23 W. R. C. R. 424.

[8] VIII. of 1890.

[9] V. of 1881.

[10] *Gungapershad Sahu* v. *Maharani Bibi* (1884), 12 I. A. 47, at p. 50; 11 Calc. 379, at pp. 383, 384; *Sikher Chund* v. *Dulputty Singh* (1879), 5 Calc. 363, at p. 381; S. C. *sub nomine Rajah Lall* v. *Delputty Singh*, 5 C. L. R. 374, at p. 401.

Effect of inquiry.

If the person dealing with the manager does make the above inquiries and acts honestly, the real existence of an alleged sufficient, and reasonably credited, necessity is not a condition precedent to the validity of his charge;[1] and, under such circumstances, he is not bound to see to the application of the purchase-money.[2]

"It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application."[3]

This principle is to be found in sec. 38 of the Transfer of Property Act,[4] which is as follows:—

"Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed."

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[1] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 424; 18 W. R. C. R., note to p. 81. See also *Tajoodeen Hossein* (*Sheikh*) v. *Bhugwanlol Sahoo*, Ben. S. D. A. 1860, p. 33; *Mahabeer Pershad Singh* v. *Dumreram Opadhya*, W. R. 1864, C. R. 166; *Trimbuck Anunt* v. *Gopallshet* (1863), 1 Bom. H. C. A. C. (2nd ed.) 27.

[2] *Radha Kishore Mookerjee* v. *Mirtoonjoy Gow* (1867), 7 W. R. C. R. 23; *Sukeenath Banoo* v. *Huro Churn Buruj* (1866), 6 W. R. C. R. 34; *Mahabeer Pershad Sing* v. *Dumreram Opadhya*, W. R. 1864, C. R. 166; *Gomain Sircar* v. *Prannath Goopto* (1864), 1 W. R. C. R. 14; *Kandhia Lal* v. *Muna Bibi* (1897), 20 All. 135; *Gane Bhive Parab* v. *Kane Bhive* (1867), 4 Bom. H. C. A. C. 169; *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547.

[3] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut Babooee*) (1856), 6 M. I. A. 393, at p. 424; 18 W. R. C. R., note to p. 81.

[4] Act IV. of 1882. See *Jamsetji N. Tata* v. *Kashinath Jivan Manglia* (1901), 26 Bom. 326, at p. 336; 3 Bom. L. R. 898.

Nature of inquiry.

The existence of a necessity and of sufficient pressure on the estate is all that the lender need inquire about.[1] He need not inquire into its causes,[2] or what is the exact amount required to be borrowed.[3] Where the lender knows, or by ordinary diligence might have known, that there are funds available and sufficient for paying off the debt, the sale would be invalid.[4] He must be entirely on his guard. He must see whether the family with which he is dealing be divided or undivided; and if the latter, at his peril he must see that the transaction be one by which the coparceners will be concluded.[5]

Consent of adult coparceners.

The fact that the adult members support the manager in the transaction may justify the person advancing the money in giving additional credit to the representations of the manager.[6]

Subsequent purchaser.

Where the transaction has been unimpeached for some years, a purchaser from the original vendee would not be expected to make minute inquiries.[7]

Burden of proof.

Where it is sought to enforce or support a sale or mortgage by a manager, the purchaser or mortgagee must prove that the transaction was entered into in good faith;[8] that he advanced in consideration of the sale or mortgage a sum of money which was reasonable with reference to the value of the property;[9] that the money was raised or applied[10] for the

[1] *Sheoraj Kooer* v. *Nuckchedee Lall* (1870), 14 W. R. C. R. 72.

[2] *Mahabir Kower* v. *Jubha Singh* (1871), 8 B. L. R. 38; 16 W. R. C. R. 221; *Luchmeedhur Singh (Baboo)* v. *Ekbal Ali* (1867), 8 W. R. C. R. 75.

[3] *Nuffer Chunder Banerjee* v. *Guddadhur Mundle* (1865), 4 W. R. C. R. 122; *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547. "If a larger portion than is required is sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise than by the course adopted." *Luchmeedhur Singh (Baboo)* v. *Ekbal Ali* (1867), 8 W. R. C. R. 75, at pp. 77, 78.

[4] *Kaleenarain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. 1864, C. R. 99. See *Gomain Sircar* v. *Prannath Gooplo* (1864), 1 W. R. C. R. 14; *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (1911), 38 Calc. 721; upheld on appeal (1915), 43 Calc. 417. He need not inquire whether the debt could have been met from other sources: *Ajey Ram* v. *Girdharee* (1872), 4 N. W. P. 110. See *Damoodur Mohapattur* v. *Birjo Mohapattur* Ben. S. D. A. 1858, p. 802.

[5] Strange's "Hindu Law," vol. i. p. 200; *Dalpatsing* v. *Nanabhai* (1864), 2 Bom. H. C. (2nd ed.) 306.

[6] *Balvant Santaram* v. *Babaji* (1884), 8 Bom. 602, at p. 609.

[7] *Surub Narain Chowdhry* v. *Shew Gobind Pandey* (1873), 11 B. L. R. App. 29.

[8] *Roopnarain Sing* v. *Gugadhur Pershad Narain* (1868), 9 W. R. C. R. 297; *Tandavaraya Mudali* v. *Valli Ammal* (1863), 1 Mad. H. C. 398.

[9] See *Saravana Tevan* v. *Muttayi Ammal* (1871), 6 Mad. H. C. Rep. 371.

[10] *Muthoora Doss* v. *Kanoo Beharee Singh* (1874), 21 W. R. C. R. 287, and cases *ante*, pp. 290, 291, and *post*, p. 294.

relief of a recognized necessity,[1] or that proper inquiries were made by him with respect to the existence of a necessity justifying the sale, and that the result of such inquiries was such as to satisfy him as an honest man of the existence of such necessity.[2]

As to a suit for specific performance see *Gurusami Sastrial* v. *Ganapathia Pillai* (1882), 5 Mad. 337.

In *Hanooman Persaud Panday's case* [3] their Lordships of the Privy Council said, "Next as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is, *primâ facie*, to support the charge, and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum*, of the Sudder Dewany Adawlut at Agra in the case of *Omed Rai* v. *Heeralall* [4] was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof, of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in

[1] *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (1903), 31 Calc. 433, at p. 455; 8 C. W. N. 408, at p. 419; *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Vadali Rama Kristnama* v. *Manda Appaiya* (1865), 2 Mad. H. C. 407; *Amarnath Sah (Lala)* v. *Achan Kuar (Rani)* (1892), 19 I. A. 196; 14 All. 420; *Bunseedhur (Lalla)* v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165. The necessity cannot be inferred from the habits and general character of the vendor: *Mittrajit Sing* v. *Raghubansi Sing* (1871), 8 B. L. R. App. 5.

[2] *Amarnath Sah (Lala)* v. *Achan Kuar (Rani)* (1892), 19 I. A. 196; 14 All. 420; *Kameswar Pershad (Baboo)* v. *Run Bahadoor Singh* (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; *Poolunder Singh* v. *Ram Pershad* (1867), 2 Agra H. C. Reps. 147; *Kasheenath Bose* v. *Chunder Mohun Nundee*, Ben. S. D. A. 1858, p. 1791; *Bheknarain Singh* v. *Januk Singh* (1877), 2 Calc. 438; *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Kumola Pershad Narain Singh* v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30; *Sheo Pershad Ram* v. *Thakoor Pershad* (1866), 5 W. R. C. R. 103; *Trimbuck Anunt* v. *Gopallshet* (1863), 1 Bom. H. C., 2nd ed., 27; *Bhoorun Koer (Mussamut)* v. *Sahebzadee* (1866), 6 W. R. C. R. 149; *Soorendro Pershad Dobey* v. *Nundun Misser* (1874), 21 W. R. C. R. 196; *Lal Singh* v. *Deo Narain Singh* (1886), 8 All. 279.

[3] *Hunooman Persaud Panday* v. *Munraj Koonweree (Mussamut Babooee)* (1856), 6 M. I. A. 393, at pp. 418, 419; 18 W. R. C. R. note to p. 81.

[4] 6 S. D. A. N. W. P. 618.

the knowledge of the sons, members of the same family, than of a stranger; consequently, this *dictum* may perhaps be supported on the general principle that the allegation, and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge,[1] as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and dependent on, them.[2] Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one, whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan."

Where a length of time has elapsed since the transaction, the vendee or person claiming through him cannot be expected to furnish the same amount of proof as in a recent transaction.[3]

The representations made by the manager at the time of the loan or alienation are evidence in favour of the person making the advance.

In *Hunooman Persaud Panday's case*[4] the following will be found: "It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the second volume of Morley's 'Digest,' seems to be the foundation of this practice (see also the case of *Brown* v. *Ram Kunaee Dutt*).[5] It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration of the older one was an

[1] See also the Indian Evidence Act I. of 1872, s. 106, which provides that "when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."

[2] See *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. H. C. 4.

[3] See *Chowdhry Herasutollah* v. *Brojo Soondur Roy* (1872), 18 W. R. C. R. 77; *Murugesam Pillai* v. *Manickavasaka Pandara* (1917), 44 I. A. 98; 40 Mad. 402; 21 C. W. N. 761; 19 Bom. L. R. 456.

[4] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussamut*) *Babooee* (1856), 6 M. I. A. 393, at pp. 419, 420; 18 W. R. C. R., note to p. 81.

[5] Ben. S. D. A. 1853, p. 883.

old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable." [1]

Recital of necessity.

A recital of the necessity does not by itself establish necessity.[2] It "is clear evidence of the representation,[3] and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed." [4]

Adequacy of price.

In determining the question of the validity of a sale, adequacy of price is often an important point to be considered,[5] though inadequacy of price is not necessarily conclusive proof of *mala fides*.[6] The mere fact that the manager or guardian might at the time of the sale have been able to make some more advantageous arrangement for the estate would not nullify a sale to a *bonâ fide* purchaser for value.[7]

Fraud.

Evidence of the *bona fides* of the transaction would of course be subject to be rebutted by evidence that the purchaser had acted *malâ fide*, or in collusion with the manager to the injury of the family.[8] If there be any fraud in proceedings to enforce a charge, which was free from fraud, such proceedings may be set aside.[9]

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[1] See *Tasouwar Ali (Syud)* v. *Koonj Beharee Lal* (1869), 3 N. W. P. H. C. 8.

[2] *Birj Lal (Lala)* v. *Inda Kunwar (Musammat)* (1914), (P. C.) 36 All. 187; 18 C. W. N. 652; 16 Bom. L. R. 352; *Ajudhia* v. *Ram Sumer Misir* (1909), 31 All. 454; *Sunker Lall* v. *Juddoobuns Suhaye* (1868), 9 W. R. C. R. 285. See *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209; 3 B. L. R. P. C. 57; 12 W. R. P. C. 47; *Makundi* v. *Sarabsukh* (1884), 6 All. 417; *Gungagobind Bose* v. *Dhunnee (Sreemutty)* (1864), 1 W. R. C. R. 59.

[3] See *Sikher Chund* v. *Dulputty Singh* (1879). 5 Calc. 363, at p. 375; 5 C. L. R. 374, at p. 387.

[4] *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1916), 43 I. A. 249; 44 Calc. 186; 21 C. W. N. 225; 18 Bom. L. R. 368.

[5] *Dagdu* v. *Kamble* (1864), 2 Bom. H. C. 343, at pp. 360, 361; *Khetermonee Dassee* v. *Kishenmohun Mitter* (1863), Marsh. 313; 2 Hay, 196; *Kumola Pershad Narain Singh (Baboo)* v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30.

[6] *Kumola Pershad Narain Singh (Baboo)* v. *Nokh Lall Sahoo* (1866), 6 W. R. C. R. 30, at p. 33.

[7] *Kool Chunder Surmah* v. *Ramjoy Surmona* (1868), 10 W. R. C. R. 8.

[8] *Bunseedhur (Lalla)* v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454, at pp. 471, 472; 1 Ind. Jur. N. S. 165.

[9] As to the rights of a purchaser at an execution-sale without notice of the fraud, see *Khetermonee Dossee* v. *Kishenmohun Mitter* (1863), Marsh. 313; 2 Hay, 196. The question whether the sale should be set aside must be determined by the Court in accordance with the principles of justice, equity, and good conscience: *Abdul Haye* v. *Nawab Raj* (1868), B. L. R., F. B. R. 911; 9 W. R. C. R. 196.

When the purchaser or lender is unable to prove necessity for the raising of the whole of the money, or he is unable to prove that he was satisfied as to the necessity for the raising of the whole sum, he is entitled to a charge on the property for the amount which it was necessary to raise, or which after reasonable inquiries was shown to him to be necessary to raise.[1] In any case he would be entitled to a charge for what is actually applied for the benefit of the family.[2]

Charge for a portion of advance.

Where necessity has been proved for the raising of all the money except a small portion, the Court may, where the father is the manager, treat such small portion as a debt of the father binding the sons (*post*, Chap. VIII.).[3]

In the case of his obtaining such charge, a creditor, who has acted fairly, would ordinarily be entitled to interest at the contract rate.[4]

Interest

Where the interest is at a rate exceeding the rate at which the manager would have been able to borrow under the circumstances, the Court will reduce the interest to such lower rate, as the rate of interest is a question to which the lender ought to have applied his mind when inquiring as to the necessity.[5] In other words, the lender must show that there was necessity to borrow at the particular rate of interest.[6]

Foreclosure proceedings, or a purchase at a sale held under a decree in a suit on the mortgage, would not relieve a mortgagee from the burden of proving the *bona fides* of the transaction, or place him in any better position with regard to the family,[7] although a *bonâ fide* purchaser without notice at a sale held in execution of a decree in a suit which was properly constituted might not be bound to inquire into the propriety of the loan which formed the basis of the decree.[8]

Burden of proof not altered by foreclosure proceedings or decree.

As to the duty of a purchaser at a sale in execution of a decree, see *post*, p. 320.

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[1] *Doorganath Roy (Konwur)* v. *Ramchunder Sen* (1875), 4 I. A. 52; 2 Calc. 311; *Deputy-Commissioner of Kheri* v. *Khanjan Singh* (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474; 9 Bom. L. R. 591.

[2] *Muthoora Doss* v. *Kanoo Beharee Singh* (1876), 21 W. R. C. R. 287. See *Hasmat Rai (Koer)* v. *Sunder Das* (1885), 11 Calc. 396; *Bunseedhur (Lalla)* v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165; *Paran Chandra Pal* v. *Karunamayi Dasi* (1871), 7 B. L. R. 90; 15 W. R. C. R. 268.

[3] *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 343; 17 C. W. N. 1025, note.

[4] See *Bunseedhur (Lalla)* v. *Bindeseree Dutt Singh* (1866), 10 M. I. A. 454; 1 Ind. Jur. N. S. 165.

[5] See *Hurronath Roy Bahadoor (Rajah)* v. *Rundhir Singh* (1890), 18 I. A. 1; 18 Calc. 311.

[6] *Nand Ram* v. *Bhupal Singh* (1911), 34 All. 126.

[7] *Purmanund* v. *Orumbah Koer (Musst.)*, W. R. 1864, C. R. 143; *Buzrung Sahoy Singh* v. *Mautora Chowdhrain (Mussamut)* (1874), 22 W. R. C. R. 119.

[8] See *ante*, p. 296.

Even if the alienation by the manager is unauthorized, his own interest will be bound in cases where the sale of a share of coparcenary property is allowable, but specific performance of an agreement to sell will not be granted in such case.[1]

Acts of coparcener not manager.

Except where, under the Mitakshara law, the father can alienate or charge the coparcenary property,[2] no individual coparcener, other than the manager, is entitled, without the consent of all the members, to deal with the joint family property.[3]

There may be circumstances where the acts of a member of the family, who is not the manager, can be treated as binding the family, on the ground that there was an express or implied agency,[4] as where money is borrowed for family purposes,[5] but minor coparceners are not bound by the act of a person who is neither a *de jure* nor a *de facto* manager.[6]

In one case [7] the acquiescence by the guardian in the act of a person who had not authority to bind the minor was held to bind the minor.

As to who may contest an alienation, see *ante*, p. 236, and *post*, pp. 304, 305.

It has been held that where a coparcener represented to the mortgagee that he had power to charge the property, he was bound to make good his representation by suing for partition.[8] On such partition the mortgage would attach to the share allotted to the mortgagor.[9]

Power of surviving coparcener.

When there are no existing coparceners, the surviving coparcener is, under the Mitakshara law, entitled to dispose of ancestral property as if it were his separate acquisition ;[10] but a gift by will will take no effect against a son who was in his

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[1] *Nagiah* v. *Venkatarama Sastrula* (1912), 38 Mad. 387, disagreeing with *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1902), 26 Mad. 74, and *Srinivasa Reddi* v. *Sivarama Reddi* (1909), 32 Mad. 320 ; *Subba* v. *Venkatrami* (1914), 38 Mad. 1187. *Naro* v. *Paragowda* (1916), 41 Bom. 347 ; 19 Bom. L. R. 69; Act I. of 1877 (Specific Relief), s. 15. See *Poraka Subbarami Reddi* v. *Vadlamuddi Seshachalam* (1909), 33 Mad. 359.

[2] *Post*, pp. 308, 309.

[3] *Guruvappa* v. *Thimma* (1887), 10 Mad. 316 ; *Rajbulubh Bhooyar* v. *Buneta De* (*Mussummaut*) (1801), 1 Ben. Sel. R. 44 (2nd ed. 59) ; *Prannath Das* v. *Calishunkar Ghosal* (1801), 1 Ben. Sel. R. 45 (2nd ed. 60). As to the duty of the purchaser, see *Shibosoondery Dossee* v. *Rakhall Doss Sirkar* (1864), 1 W. R. C. R. 38.

[4] See *Krishna Ayyar* v. *Krishnasami Ayyar* (1900), 23 Mad. 597 ; *Vithu Dhondi* v. *Babaji* (1908), 32 Bom. 375.

[5] *Buldeo Ram Tewaree* v. *Somessur Panray* (1867), 7 W. R. C. R. 490.

[6] *Balwant Singh* (*Raja*) v. *Clancy* (1912), 39 I. A. 109 ; 34 All. 296 ; 16 C. W. N. 577 ; 14 Bom. L. R. 422.

[7] *Mahableshvar Krishnappa* v. *Ramchandra Mangesh* (1913), 38 Bom. 94 ; 15 Bom. L. R. 882.

[8] *Ram Sunder Das* (*Mahanth*) v. *Barhamdeo Narayan Thakur* (1909), 14 C. W. N. 552 ; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90 ; 20 W. R. C. R. 192.

[9] *Ibid.*

[10] *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (1856), 6 M. I. A. 309 ; *Vallinayagam Pillai* v. *Pachche* (1863), 1 Mad. H. C. 326 ; *Narottam Jagjivan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. A. C. 6 ; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. 31. See *ante*, p. 220. As to the power to deal with separate

mother's womb at the time of the death of his father,[1] or is subsequently adopted by his widow,[2] or was before his death adopted by the widow of a previously deceased coparcener.[3]

ALIENATION OF AN UNDIVIDED SHARE.

Alienation of undivided share. Bengal school.

A Hindu governed by the Bengal school of Hindu law can deal with his undivided share of joint family property either by act *inter vivos* or by will, in the same way as he can deal with his separate property.[4] On his death intestate his undivided share passes to his heir.

His share may be sold in execution of a decree.

The purchaser has been held entitled to be put into possession of the share bought by him,[5] but not in such a way as to interfere with the family.

In one case [6] when he applied for possession, a share was allotted to him in severalty. This had the same effect as if he had brought a partition suit.

Mitakshara School.

According to the Mitakshara law, except where the debtor is the father, or paternal grandfather of a coparcener, whose rights are enlarged by his death, a creditor of a coparcener, who has not obtained a judgment and has not attached the debtor's interest [7] before the death of his debtor,[8] has no right to recover his debt from the coparcenary property.[9]

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acquisitions, see *ante*, pp. 248, 249. The last surviving member of a Madras *tarwad* can dispose of the *tarwad* property by will, *Alami* v. *Komu* (1888), 12 Mad. 126.

[1] *Minakshi* v. *Virappa* (1884), 8 Mad. 89; *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105; *Vrandavandas Ramdas* v. *Yamunabhai* (1875), 12 Bom. H. C. 229.

[2] *Venkatanarayana Pillai* v. *Sabbannal* (1915), 43 I. A. 20; 39 Mad. 107; 20 C. W. N. 234; 17 Bom. L. R. 468, *ante*, p. 184.

[3] *Chandra* v. *Gojarabai* (1890), 14 Bom. 463, at p. 466.

[4] *Ram Debul Lall* v. *Mitterjeet Singh* (1872), 17 W. R. C. R. 420; *Anund Chund Rai* v. *Kishen Mohun Bunoja* (1905), 1 Ben. Sel. R. 115 (new edition, 152); *Ramkunhaee Rai* v. *Bung Chund Bunhoojea* (1820), 3 Ben. Sel. R. 17 (new edition, 22); *Kounla Kant Ghosal* v. *Ram Huree Nund Gramee* (1827), 4 Ben. Sel. R. 196 (new edition, 247).

[5] *Rajanikanth Biswas* v. *Ram Nath Neogy* (1883), 10 Calc. 244.

[6] *Bijoy Keshub Roy Bahadoor (Koonwar)* v. *Shama Soonduree Dossee* (1865), 2 W. R. M. A. 30. See *Kesubnath Ghose* v. *Hurgovind Bose*, Ben. S. D. A., 1853, p. 768; *Ramtonoo Chatterjee* v. *Ishurchunder Neogee*, Ben. S. D. A., 1857, p. 1585.

[7] This does not include an attachment before judgment: *Ramanayya* v. *Rangappayya* (1893), 17 Mad. 144.

[8] *Bithal Das* v. *Nand Kishore* (1900), 23 All. 106; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 108, 109; 5 Calc. 148, at pp. 173, 174; 4 C. L. R. 226, at p. 241; *Bailur Krishna Rau* v. *Lakshmana Shanbhogue* (1881), 4 Mad. 302; *Balkishen (Rai)* v. *Sitaram (Rai)* (1885), 7 All. 731.

[9] *Bithal Das* v. *Nand Kishore*

If it were otherwise, the right of survivorship[1] would be ineffectual.

Sale in execution.

He can obtain a sale of the undivided interest of his debtor in the property of the coparcenary in execution of a decree,[2] if during the lifetime of the debtor there has been an attachment and order for sale.[3]

A provisional release from attachment does not affect his right.[4]

The purchaser at such sale is not entitled to sue for possession,[5] but is entitled to ascertain his share by such partition as the judgment debtor might have compelled before the alienation of his share took place.[6]

If he has obtained possession he is not liable to be turned out, but the coparceners are entitled to joint possession with him.[7]

(1900), 23 All. 106; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Narsinbhat* v. *Chenapa* (1877), 2 Bom. 479; *Balbhadhar* v. *Bisheshar* (1886), 8 All. 495; *Jagannath Prasad* v. *Sitaram* (1888), 11 All. 302; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. 31, at p. 35; 12 W. R. F. B. 1, at p. 3.

[1] *Ante*, pp. 236, 237.

[2] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88; 5 Calc. 148; 4 C. L. R. 226; *Hurdey Narain Sahu (Baboo)* v. *Rooder Perkash Misser (Pundit Baboo)* (1883), 11 I. A. 26; 10 Calc. 626; *Tuffuzzool Hossein Khan (Syud)* v. *Rughoonath Pershad* (1871), 14 M. I. A. 40, at p. 50; *Jumoona Persad Singh* v. *Dignarain Singh* (1883), 10 Calc. 1; 13 C. L. R. 74; *Jallidar Singh* v. *Ram Lal* (1878), 4 Calc. 723; *Narain Dass (Rai)* v. *Nownit Lal* (1879), 4 Calc. 809; 4 C. L. R. 67; *Collector of Monghyr* v. *Hurdai Narain Shahai* (1879), 5 Calc. 425; 5 C. L. R. 112; *Vasudev Bhat* v. *Venkatesh Sanbhav* (1873), 10 Bom. H. C. 139; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Virasvami Gramini* v. *Ayyasami Gramini* (1863), 1 Mad. H. C. 471; *Goor Surun Dass* v. *Ram Surun Bhukut* (1866), 5 W. R. C R. 54.

[3] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 109; 5 Calc. 148, at p. 174; 4 C. L. R. 226, at p. 241; *Balkishen (Rai)* v. *Sita Ram (Rai)* (1885), 7 All. 731; *Parikh Girdarlal* v. *Thakor Fatehsing* (1899), 2 Bom. L. R. 32. In *Bithal Das* v. *Nand Kishore* (1900), 23 All. 106, the mere attachment seems to have been held sufficient to create a charge, but it is doubtful whether it has such effect, see *Soobhul Chunder Paul* v. *Nitye Churn Bysack* (1880), 6 Cal. 663.

[4] *Ram Chandra Marwari* v. *Mudeshwar Singh* (1906), 33 Calc. 1158; 10 C. W. N. 979.

[5] *Kallapa* v. *Venkatesh Vinayak* (1878), 2 Bom. 676; *Palani Konan* v. *Masa Konan* (1896), 20 Mad. 243.

[6] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; *Hurdey Narain Sahu (Baboo)* v. *Rooder Perkash Misser* (1883), 11 I. A. 26; 10 Calc. 626; *Jallidar Singh* v. *Ram Lall* (1878), 4 Calc. 723; *Sumrun Thakur* v. *Chundermun Misser* (1879), 5 C. L. R. 26; 3 C. L. R. 282; *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Lall Jha (Baboo)* v. *Juma Buksh (Sheikh)* (1874), 22 W. R. C. R. 116; *Maruti Narayan* v. *Lila Chand* (1882), 6 Bom. 564; *post*, p. 331.

[7] *Mahabalaya* v. *Timaya* (1875), 12 Bom. H. C. 138; *Babaji Lakshman* v. *Vasudev Vinayak* (1876), 1 Bom. 95; *Kallapa* v. *Venkatesh Vinayak* (1878), 2 Bom. 676; *Hari Premji (Patil)* v. *Hakamchand* (1884), 10 Bom. 363.

The interest of a coparcener can, in case of his absconding, be attached under section 88 of the Criminal Procedure Code (Act V. of 1898).[1]

The question whether a member of a joint family governed by the Mitakshara school of law can alienate or charge his interest in the coparcenary property, must be determined according to the Province in which the case arises. Alienation.

It is settled law in Madras [2] and Bombay [3] that a purchaser for value [4] acquires the interest of his vendor, that is a right to partition, and a right on partition to the share to which his vendor would have been entitled,[5] but without partition he cannot acquire a right to any specific property [6] or to a specific share. He is not entitled to possession,[7] his right in that respect being the same as the right of a purchaser at a sale in execution of a decree.[8]

The Judicial Committee has recognized this to be the law applicable in Madras and Bombay.[9]

It has been said that the purchaser becomes " a sort of tenant in common with the coparceners, admissible as such to his distributive share upon a Position of purchaser.

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[1] *Secretary of State* v. *Rangasamy Ayyangar* (1916), 39 Mad. 831.

[2] *Virasvami Gramini* v. *Ayyasvami Gramini* (1863), 1 Mad. H. C. 471; *Peddamuthulaty* v. *N. Timma Reddy* (1864), 2 Mad. H. C. 270; *Palanivelappa Kaundan* v. *Mannaru Naikan* (1865), 2 Mad. H. C. 416; *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 167; *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1902), 25 Mad. 690.

[3] *Tukaram Ambaidas* v. *Ramchandra* (1869), 6 Bom. H. C. A. C. J. 247; *Vasudev Bhat* v. *Venkatesh Sanbhav* (1873), 10 Bom. H. C. 139; *Fakirapa* v. *Chanapa* (1873), 10 Bom. H. C. 162. For a case of an assignment to a coparcener, see *Shivajirao* v. *Vasantrao* (1908), 33 Bom. 267; 10 Bom. L. R. 778.

[4] In the case of a sale for inadequate consideration, the purchaser is entitled to a charge for the amount paid. *Rottala Runganathan Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162.

[5] *Ante*, p. 299. As to a share governed by the Aliyasantana law, see *Byari* v. *Puttanna* (1890), 14 Mad. 38. As to a right of worship, see *post*, pp. 573, 574.

[6] *Venkatachella Pillay* v. *Chinnaiya Mudaliar* (1870), 5 Mad. H. C. 166; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6.

[7] Act IV. of 1882, s. 44. See *Bhiku* v. *Puttu* (1906), 8 Bom. L. R. 99; *Girija Kanta Chakrabarty* v. *Mohim Chandra Acharjya* (1915), 20 C. W. N. 675; *Kota Balabadra Patro* v. *Khetra Doss* (1916), 31 Mad. L. J. 275.

[8] *Ante*, p. 299.

[9] *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181, at p. 195; 5 Bom. 48, at p. 62; *Balgobind Das* v. *Narain Lal* (1893), 20 I. A. 116, at p. 125; 15 All. 339, at p. 351; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at pp. 101, 102; 5 Calc. 148, at p. 166; 4 C. L. R. 226, at p. 234.

partition taking place";[1] but he has a mere equity to partition,[2] and is not entitled to mesne profits.[3]

He has no right to a share in any specific property, although such share may have been transferred to him.[4]

As to his right to partition, see *post*, p. 331.

It has been held in Bombay that the position of the purchaser is not improved by the death of other coparceners before partition. He stands in no better position than his alienor, and, consequently, like the latter, is liable to have his share diminished before partition by the birth of other coparceners, if he stands by and does not insist upon an immediate partition.[5] It has been held in Madras that he takes on partition such share as the alienor had at the time of the alienation.[6]

Agreement not to sell.

An agreement in restraint of the alienation of an undivided share is valid,[7] but it will not, it is submitted, bind a purchaser, at any rate where he has received no notice of the agreement.[8] It does not affect a purchaser at a sale in execution of a decree.[9]

In Bengal [10] and in the United Provinces [11] a coparcener has no power to alienate by sale or mortgage his undivided share [12] to a stranger or to a coparcener for his own benefit [13] without the consent of his coparceners. This view has been accepted by the Judicial Committee.[14]

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[1] *Vasudev Bhat* v. *Venkatesh* (1873), 10 Bom. H. C. 139, at p. 147.

[2] *Manjaya* v. *Shanmuga* (1913), 38 Mad. 684.

[3] *Maharajah of Bobbili* v. *Venkataramanjulu Naidu* (1914), 39 Mad. 265.

[4] *Manjaya* v. *Shanmuga* (1913), 38 Mad. 684.

[5] *Gurlingapa* v. *Nandapa* (1896), 21 Bom. 797.

[6] *Chinnu Pillai* v. *Kalimutha Chetti* (1911), 35 Mad. 47, differing from *Rangasami* v. *Krishnayyan* (1891), 14 Mad. 408.

[7] *Lachmi Chand* v. *Tori Lal* (1878), 1 All. 618.

[8] Cf. *Kanna Pisharodi* v. *Kombi Achen* (1885), 8 Mad. 381.

[9] Cf. *Golak Nath Roy Choudhry* v. *Mathura Nath Roy Chowdhry* (1891), 20 Calc. 273.

[10] *Jwala Prasad* v. *Protap Udainath Sahi Deo (Maharajah)* (1916), 1 Pat. L. J. 497; C. W. N. [1917, Pat.] 27; *Sadabart Prasad Sahu* v. *Foolbash Koer* (1869), 3 B. L. R. F. B. R. 31; 12 W. R. F. B. 1; and cases there cited: *Nathu Lal Chowdhry* v. *Chadi Sahi* (1869), 4 B. L. R. A. C. 15; 12 W. R. C. R. 447; *Mahabeer Persad* v. *Ramyad Sing* (1873), 12 B. L. R. 90; 20 W. R. C. R. 192; *Bunsee Lall* v. *Aoladh Ahsan (Shaikh)* (1874), 22 W. R. C. R. 552; *Chunder Coomar* v. *Hurbuns Sahai* (1888), 16 Calc. 137. As to a lease, see *Ram Debul Lall* v. *Mitterjeet Singh* (1872), 17 W. R. C. R. 420.

[11] *Kali Shankar* v. *Nawab Singh* (1909), 31 All. 507; *Joynarain Sing* v. *Roshun Sing*, 2 S. D. A. N. W. P. (1860), 162; *Goor Pershad* v. *Sheodeen* (1872), 4 N. W. P. 137; *Chamaili Kuar* v. *Ram Prasad* (1879), 2 All. 267; *Rama Nand Singh* v. *Gobind Singh* (1883), 5 All. 384; *Chandar Kishore* v. *Dampat Kishore* (1894), 16 All. 369; *Bhagirathi Misr* v. *Sheobhik* (1898), 20 All. 325. See *Amolak Ram* v. *Chandan Singh* (1902), 24 All. 483.

[12] He can do so when they are so far separate, that each collects his quota of rent separately, *Kalika Sahoy* v. *Gouree Sunkur* (1869), 12 W. R. C. R. 287.

[13] It has been held that he can alienate it for the benefit of the family, *Juggurnath Khootia* v. *Doobo Misser* (1870), 14 W. R. C. R. 80.

[14] *Balgobind Das* v. *Narain Lal*

The alienation of his share by one member would imply his consent to the alienation of their shares by the other members.[1]

Equity on setting aside alienation.

The alienation will not be set aside at the instance of the alienor or persons claiming through him except upon the terms of refunding the amount paid with interest.[2]

Mortgage of undivided share.

Where a coparcener has mortgaged or sold his undivided share of specified coparcenary property (where such mortgage or sale is permissible), and the property has on partition been allotted to another member, the mortgagee or purchaser is entitled to a charge upon other property allotted on the partition to the person dealing with him,[3] as the co-sharer to whom it is allotted takes the property free of the incumbrance.[4]

This rule has no application to a transaction entered into with the general body of coparceners.[5]

Before partition, the mortgagee is entitled to a declaration that he has a charge on the interest of the mortgagors.[6]

It has been held in Bengal that, while declaring the mortgage of an undivided share to be void, the Court may direct that the joint property be held in specified shares, and may attach the lien of the mortgage to the share allotted to the mortgagor.[7] A similar order was made in the case of a sale.[8] These decisions, it is submitted, practically have the effect of validating a mortgage or sale of a share [9]

Gift or devise.

The power to dispose by gift or will of an interest in coparcenary property whether movable or immovable [10] in a case subject to the Mitakshara law is disallowed by all the High Courts.[11]

As a right of survivorship accrues to the other coparceners on the

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(1893), 20 I. A. 116, at p. 125; 15 All. 339, at p. 351; *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157.

[1] *Ganraj Dubey* v. *Sheozore Singh* (1880), 2 All. 898.

[2] *Jamuna Parshad* v. *Ganga Pershad Singh* (1892), 19 Calc. 401.

[3] See *Byjnath Lall* v. *Ramoodeen Chowdhry* (1873), 1 I. A. 106; 21 W. R. C. R. 233; *Hemchunder Ghose* v. *Thakomoni Debi* (1893), 20 Calc. 533; *Amolak Ram* v. *Chandan Singh* (1902), 24 All. 483.

[4] *Nagendra Mohan Roy* v. *Pyari Mohan Saha* (1915), 43 Calc. 103.

[5] *Sundar Lal* v. *Brij Lal* (1913), 35 All. 543.

[6] *Doddappa* v. *Somappa* (1906), 8 Bom. L. R. 550.

[7] *Ram Soonder Das* (*Mohanth*) v. *Nathuni Singh* (1911), 15 C. W. N. 748; *Ram Sunder Das* (*Mahanth*) v. *Barhamdeo Narayan Thakur* (1909), 14 C. W. N. 552; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90; 20 W. R. C. R. 192.

[8] *Bunwari Lal* v. *Daya Sunker Misser* (1909), 13 C. W. N. 815.

[9] See *ante*, p. 302. Cf. *Kali Shankar* v. *Nawab Singh* (1909), 31 All. 507.

[10] *Parvatibai* v. *Bhagwant* (1915), 39 Bom. 593; 17 Bom. L. R. 646.

[11] *Baba* v. *Timma* (1883), 7 Mad. 357; *Ponnusami* v. *Thatha* (1886), 9 Mad. 273; *Ramanna* v. *Venkata* (1888), 11 Mad. 246; *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetti* (1903), 27 Mad. 162; *Gopal Lal* v. *Mahadeo Prasad* (1901), 6 C. W. N. 651; *Sitaram Pandit* (*Shri*) v. *Harihar Pandit* (*Shri*) (1910), 35

death of a coparcener,[1] it follows that there can be no right to dispose of any interest in the coparcenary property by will.[2]

A distinction has been made between a gift to a stranger and a gift to a coparcener,[3] but it is submitted that no such distinction is admissible.

As to the power of the last surviving coparcener, see *ante*, pp. 298, 299.

A local custom, whereby a coparcener or his wife could in the absence of male issue give his share to his daughter or daughter's son has been recognized.[4]

SETTING ASIDE ALIENATION.

Who may contest alienation.

An alienation of coparcenary property, or of any interest therein, by a father or other manager, or by a coparcener or stranger, may be contested by the son or any coparcener who was born,[5] conceived,[6] or adopted [7] at the time of the completion of the alienation,[8] or before an effective ratification of the alienation by the whole of the family,[9] and is entitled to a share on partition.

Bom. 109; *Gangubai* v. *Ramanna* (1866), 3 Bom. H. C. (A. C. J.) 66; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Vrandavandas Ramdas* v. *Yamunabai* (1875), 12 Bom. H. C. 229; *Kalu* v. *Barsu* (1894), 19 Bom. 803. See *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181, at p. 195; 5 Bom. 48, at p. 62; 7 C. L. R. 320, at p. 329. As to the power of a father to make a gift of coparcenary property, see *ante*, pp. 284, 285.

[1] *Ante*, pp. 236, 237.

[2] *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (1903), 27 Mad. 228; *Rathnam* v. *Sivasubramania* (1892), 16 Mad. 353; *Vitla Butten* v. *Yamenamma* (1874), 8 Mad. H. C. 6; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181; 5 Bom. 48; 7 C. L. R. 320; *Harilal Bapuji* v. *Mani (Bai)* (1905), 29 Bom. 351; 7 Bom. L. R. 255; *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1884), 9 Bom. 438; *Lakshmi Shankar* v. *Vaijnath* (1881), 6 Bom. 24; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. 31; *Buldeo Singh (Rajah)* v. *Mahabeer Singh* (1866), 1 Agra H. C. 155; *Minakshi* v. *Virappa* (1884), 8 Mad. 89; Hindu Wills Act (XXI. of 1870), s. 3.

[3] *Joitaram* v. *Ramkrishna* (1902), 27 Bom. 31, at pp. 40, 41; 4 Bom. L. R. 754.

[4] *Nandi Singh* v. *Sita Ram* (1888), 16 I. A. 44; 16 Calc. 677.

[5] *Girdharee Lall* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (1907), 34 Calc. 372; 11 C. W. N. 462; *Chuttan Lal* v. *Kallu* (1910), 33 All. 283; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731, at p. 741; 8 W. R. C. R. 15, at p. 21; *Aghori Ramasarg Sing* v. *Cochrane* (1870), 5 B. L. R. App. 14.

[6] *Madho Singh* v. *Hurmut Ally* (1868), 3 Agra, 432; *Jado Singh* v. *Ranee (Mussumat)* (1873), 5 N. W. P. 113. See, however, *Goura Chowdhrain (Mussamut)* v. *Chummun Chowdhry*, W. R. (1864), C. R. 340. Cf. *Yekeyamian* v. *Agniswarian* (1869), 4 Mad. H. C. 307.

[7] See *Sudanund Mohapattur* v. *Soorjo Monee Dayee* (1869), 11 W. R. C. R. 436; *Rambhat* v. *Lakshman Chintaman Mayalay* (1881), 5 Bom. 630; as to an adopted son setting aside an alienation by the widow adopting him, see *ante*, pp. 199, 200.

[8] See *Ponnambula Pillai* v. *Sundarapayyar* (1897), 20 Mad. 354; *Narain Das* v. *Har Dayal* (1913), 35 All. 571.

[9] *Hazari Mall Babu* v. *Abaninath Adhurjya* (1912), 17 C. W. N. 280; *Hurodoot Narain Singh* v. *Beer Narain Singh* (1869), 11 W. R. C. R. 480.

A coparcener who was born after an invalid alienation is also entitled to have it set aside,[1] so far as it was invalid at the time of the alienation,[2] and affected an interest which was vested in him by birth.

A person disqualified from inheritance cannot sue, although he may have a right of maintenance.[3]

It has been held that an invalid alienation made without the consent of existing sons can be set aside at the instance of a son who was not born at the time of the alienation, but it is clear that an alienation which by consent or otherwise was binding upon all the coparceners in existence at the time cannot be contested by a person who is born subsequently.[4]

Death of person entitled to contest alienation.

In a family governed by the Mitakshara law a suit to set aside an alienation cannot on the death of the plaintiff be continued by his heir, as his right lapses.[5] Under the Bengal school the right would pass to the heir.

The person entitled to contest an alienation may sue to set aside the alienation, or if it has not taken place may sue for an injunction.[6] Where he cannot obtain substantive relief he can sue for a declaratory decree.[7]

How alienation is to be set aside.

In a case governed by the Bengal school of law a coparcener can sue to set aside an alienation, so far only as it affects his share of the coparcenary property.

Under the Mitakshara school, in the case of an invalid alienation in the Bombay or Madras Presidencies by a coparcener, the coparcener aggrieved may be entitled to have it set aside except so far as the share of the alienor is concerned,[8] but where the alienation is valid in part only it may be equitable to distribute the valid portion of the consideration over the whole property.[9] In Bengal or the United Provinces he is

[1] *Hurodoot Narain Singh* v. *Beer Narain Singh* (1869), 11 W. R. C. R. 480; *Tulshi Ram* v. *Babu* (1911), 33 All. 654; *Jwala Prasad* v. *Protap Udainath Sahi Deo* (*Maharajah*) (1916), 1 Pat. L. J. 497; C. W. N. [1917 Pat.] 27.

[2] See *Naro* v. *Paragowda* (1916), 41 Bom. 347; 19 Bom. L. R. 69.

[3] *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919; *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*), 8 Calc. 149; 9 C. L. R. 487. See *Naro* v. *Paragowda* (1916), 19 Bom. L. R. 69.

[4] See *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (1907), 34 Calc. 372; 11 C. W. N. 462; *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372, at p. 375; *Ramasamayyan* v. *Virasami Ayyan* (1898), 21 Mad. 222.

[5] *Padarath Singh* v. *Raja Ram* (1882), 4 All. 235.

[6] *Knath Narain Singh* v. *Prem Lal Paurey* (1865), 3 W. R. C. R. 102; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. Sup. Vol. 731; 8 W. R. C. R. 15; *Retoo Raj Pandey* v. *Lalljee Pandey* (1875), 24 W. R. C. R. 399.

[7] As to declaratory decrees, see Act I. of 1877, s. 42; *Kathama Natchiar* v. *Dorasinga Tever* (1875), 2 I. A. 169; 15 B. L. R. 83; 23 W. R. C. R. 314.

[8] See *Marappa Gaundan* v. *Rangasami Gaundan* (1899), 23 Mad. 89; *Naro* v. *Paragowda* (1916), 19 Bom. L. R. 69.

[9] *Vadivelam Pillai* v. *Natesam Pillai* (1912), 37 Mad. 435.

entitled to have the whole alienation set aside, subject to such equities as may be applicable.[1]

This distinction arises because a sale of an undivided interest is permissible in the two former Presidencies.[2]

It has been held that a son is not entitled, during the father's lifetime, to eject the purchaser because the father sells without authority.[3] He may bring a suit for partition, or may be entitled to a decree for possession [4] on such terms as may be equitable, as, for instance, that the purchaser be entitled to a charge for the money paid by him,[5] or be entitled to sue for partition.[6]

In a case where the father had made over a share to a stranger, the Judicial Committee held that it was not necessary for the sons to sue for partition.[7]

Consent of coparcener.

The consent of an adult coparcener or his acquiescence, at any rate where it amounts to an estoppel, prevents him from disputing an alienation made by a father or other manager.[8] The ratification of the alienation by him will also, it is submitted, have the same effect.[9]

Limitation of suit.

A suit brought by a Hindu governed by the law of the Mitakshara to set aside his father's alienation [10] of ancestral property must be brought within twelve years from the time when the alienee takes possession of the property.[11]

Compensation.

When the coparcener seeking to set aside the alienation, or the family has benefited by the alienation, it may be equitable

[1] *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing (Baboo)*, 8 B. L. R 358; 15 W. R. F. B. 6. See *post*, pp 306, 307.

[2] *Ante*, p. 301.

[3] *Baboo Ram* v. *Gajadhur Singh* (1867), Agra H. C. F. B. R. 86; *Pursun Sahoo* v. *Ramdeen Lall*, S. D. A. R. N. W. P., 1852, p. 365; *Chutter Dharee Lal* v. *Bikaoo Lal*, Ben. S. D. A., 1850, p. 282.

[4] *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing (Baboo)* (1879), 8 B. L. R. 358; 15 W. R. F. B. 6.

[5] *Post*, p. 307.

[6] *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; 1 C. L. R. 49; *Hurdey Narain Sahu (Baboo)* v. *Rooder Perkash Misser (Pundit Baboo)* (1883), 11 I. A. 26; 10 Calc. 626.

[7] *Ramkishore Kedarnath* v. *Jainarayan Ramrachppal* (1913), 40 I. A. 213; 40 Calc. 966; 17 C. W. N. 1189; 15 Bom. L. R. 867.

[8] See *Miller* v. *Runga Nath Moulick* (1885), 12 Calc. 389; Act I, of 1872, s. 115. The mere absence of objection does not amount to acquiescence, see *Kamakshi Ammal* v. *Chakrapany Chettiar* (1907), 30 Mad. 452. See *ante*, p. 283.

[9] See *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018, at p. 1020; 9 W. R. C. R. 511, at p. 512; *Gangabai* v. *Vamanaji A. Datar* (1864), 2 Bom. H. C. (2nd ed.) 301. As to ratification of the manager or guardian's acts after the ward has attained majority, see *Chetty Colum Comara Vencatachella Reddyer* v. *Rungasaumy Streemunth Jyengar Bahadoor (Rajah)* (1861), 8 M. I. A. 319; *Prosonno Koomar Bural* v. *Sajudoor Ruhman (Chowdree)*, Ben. S. D. A., 1853, p. 525; *Ramasawmi Aiyan* v. *Venkataramaiyan* (1879), 6 I. A. 196; 2 Mad. 91. See *ante*, p. 283.

[10] This does not include a sale in execution of a decree: *Issuri Dutt Singh* v. *Ibrahim* (1881), 8 Calc. 653.

[11] Act IX. of 1908 (Limitation), Sched. I, art. 126, *Maheswar Dutt*

to compensate the purchaser or mortgagee,[1] but there is no equity entitling him to a refund of purchase-money in respect of a share, which is not bound by the purchase.[2]

The alienee may be required to pay mesne profits from the date of the repudiation.[3]

As to a sale or mortgage by the father, see *post*, p. 315.
As to a sale of an undivided share, see *ante*, pp. 301–303.

Improvements.

Where the purchaser has, to the knowledge of those interested in setting aside the sale, and without their protest,[4] or without their knowledge, if he believed in good faith that he had an absolute title,[5] laid out sums for the improvement or benefit of the property, they may be required to compensate him.

The amount of compensation depends upon whether the improvement has enhanced the market value of the property.[6]

The burden is upon the alienee to show that the money has been applied to family purposes; or that the person seeking to set aside the alienation has benefited thereby.[7]

There is authority that when the alienation is invalid on account of the absence of necessity the manager is liable in damages to the purchaser.[8]

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v. *Kishun Singh* (1907), 34 Calc. 184; 11 C. W. N. 294; *Sheo Narain Ray* v. *Mokshoda Das Mittra* (1913), 17 C. W. N. 1022. As to the case where he was a minor at the time of the sale, see *Mahableshvar* v. *Ramchandra* (1913), 38 Bom. 94; 15 Bom. L. R. 582. See *Bunwari Lal* v. *Daya Sunker Misser* (1909), 13 C. W. N. 815; *Raja Ram Tewary* v. *Luchman Persad* (1867), B. L. R. F. B. R. 731; 8 W. R. C. R. 15; *Munbasi Koer* v. *Nowrutton Koer* (1881), 8 C. L. R. 428; *Beer Pershad* v. *Doorga Pershad*, W. R. 1864, p. 215; *Seetul Pershad Singh (Baboo)* v. *Gour Dyal Singh (Baboo)* (1864), 1 W. R. C. R. 283 (an alienation by a grandfather); *Beer Kishore Suhye Singh (Baboo)* v. *Hur Bullub Narain Singh (Baboo)* (1867), 7 W. R. C. R. 502; *Aghori Ramasarg Sing* v. *Cochrane* (1870), 5 B. L. R. App. 14; *Balwantrao* v. *Ramkrishna* (1901), 3 Bom. L. R. 682.

[1] See *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194, at pp. 198, 199; 18 Calc. 157, at pp. 163, 164; *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing (Baboo)* (1870), 8 B. L. R. 358; 15 W. R. F. B. 6; *Suruh Narain Chowdhry* v. *Shew Gobind Pandey* (1873), 11 B. L. R. App. 29; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90; 20 W. R. C. R. 192. See, however, *Marappa Gaundan* v. *Rangasami Gaundan* (1899), 23 Mad. 89.

[2] *Virabhadra Gowdu* v. *Guruvenkata Charlu* (1898), 22 Mad. 312. See *Sivaganga Zamindar* v. *Lakshmana* (1885), 9 Mad. 188, at pp. 200, 201.

[3] *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (1916), 39 All. 61.

[4] *Dattaji Sakharam Rajadhiksh* v. *Kalba Yese Parabhu* (1896), 21 Bom. 749.

[5] Act IV. of 1882 (Transfer of Property), s. 51; see *Abhoy Churn Ghose* v. *Attarmani Dassee* (1908), 13 C. W. N. 931.

[6] *Kidar Nath* v. *Mathu Mal* (1913), 40 Calc. 555; 17 C. W. N. 797; 15 Bom. L. R. 467.

[7] *Modhoo Dyal Singh* v. *Kolbur Singh* (1868), B. L. R. F. B. R. 1018; 9 W. R. C. R. 511, differing from *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (1863), 6 W. R. C. R. 71; *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing (Baboo)* (1870), 8 B. L. R. 358; 15 W. R. F. B. R. 6.

[8] *Adikesavan Naidu* v. *Gurumatha Chetti* (1916), 40 Mad. 338.

CHAPTER VIII.

THE DEBTS OF A FATHER UNDER THE MITAKSHARA LAW.

Duty of son to pay debts of father.

THE Hindu law imposes upon a son, and grandson, the duty of paying the debts of his father, and paternal grandfather,[1] from whom he has not separated,[2] provided that they have not been incurred for immoral or illegal purposes,[3] or are barred by the law of limitation.[4]

As according to Hindu ideas a man and his three male paternal ancestors are the same person in different bodies, there would be a similar liability to pay the debts of a great-grandfather,[5] but by a special rule of limitation the liability does not extend beyond the grandson.[6]

There is no such duty under the Malabar law.[7]

"By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."[8] Although under the Mitakshara system of law, the father takes no greater interest than his son in coparcenary property he can pay his personal debts out of the income of such property,[9] and can bind his sons and grandsons,[10] whether they be minors or adults,[11] by a

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[1] Colebrooke's "Digest," vol. i. pp. 267, 334; "Narada Smriti," chap. iii. paras. 4, 6.

[2] *Fakir Chand* v. *Daya Ram* (1902), 25 All. 67.

[3] Colebrooke's "Digest," pp. 300, 305, 309, 311.

[4] *Subramania Aiyar* v. *Gopala Aiyar* (1909), 33 Mad. 308; *Naro* v. *Paragowda* (1916), 41 Bom. 347; 19 Bom. L. R. 69.

[5] See note to Edition of "Narada Smriti" in Sacred Books of the East, vol. xxxiii. pp. 43, 44.

[6] See Ghose's "Hindu Law," 2nd ed., pp. 417, 418.

[7] *Kunhu Kutti Ammah* v. *Mallapratu* (1913), 38 Mad. 527.

[8] *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussumat Babooee*) (1856), 6 M. I. A. 393, at p. 421; 10 W. R. C. R., note to p. 81; *Girdharee Lall* v. *Kantoo Lal* (1874), 1 I. A. 321, at p. 331; 14 B. L. R. 187, at p. 197; 22 W. R. C. R. 56, at p. 58.

[9] This follows from his power to charge and sell.

[10] It does not bind any one else, as, for instance, a nephew; *Gangulu* v. *Ancha Bapula* (1881), 4 Mad. 73; *Ram Ratan* v. *Lachman Das* (1908), 30 All. 460

[11] *Phul Chand* v. *Man Singh* (1882), 4 All. 309; *Baso Kooer* v. *Hurry Doss* (1882), 9 Calc. 495, at p. 501; 12 C. L. R. 292, at p. 297; *Bhagat Mal Sahu* v. *Abdul Karim* (*Sk*) (1916), 20 C. W. N. 297; 1 Pat. L. J. 86; *Nathuni Sahu* v. *Baijnath Prasad* (1917), 2 Pat. L. J. 212.

charge or alienation of the coparcenary estate, or of any portion thereof, for the purpose of paying such of his debts,[1] which he has incurred before the date of such charge or alienation,[2] provided that such debts have not been incurred for an illegal or immoral purpose or consideration.[3]

This applies to the alienation of a *babuana* grant.[4] Sons are bound whether they consent or not.[5]

As to the custom of agriculturists in the Panjab, see *Kirpal Singh* v. *Balwant Singh* (1912), 40 Calc. 288; 17 C. W. N. 302; 15 Bom. L. R. 1912.

"When the father alienates the property he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him; he is

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[1] This does not apparently include a claim to damages, see *Pareman Das* v. *Bhattu Mahton* (1897), 24 Calc. 672.

[2] *Venkataramanya Pantulu* v. *Venkataramana Doss Pantulu* (1905), 29 Mad. 200; *Chandradeo Singh* v. *Mata Prasad* (1909), 31 All. 176; *Kali Shankar* v. *Nawab Singh* (1909), *ibid.* 507; *Sitaram Pandit (Shri)* v. *Harihar Pandit (Shri)* (1910), 35 Bom. 169; 12 Bom. L. R. 910; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613; *Surja Prasad* v. *Golab Chand* (1900), 27 Calc. 762; *Laljee Sahoy* v. *Fakeer Chand* (1880), 6 Calc. 135; 7 C. L. R. 97; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 470. This will include a prior debt due by the father to the person to whom he mortgaged or conveyed family property: *Badri Prasad* v. *Madan Lal* (1893), 15 All. 75, at p. 80. It includes money due on account of property purchased: *Kapildeo* v. *Thakur Prasad* (1913), 36 All. 17. It does not include a liability as surety, *Hira Lal Marwari* v. *Chandrabali Haldarin* (1908), 13 C. W. N. 9.

[3] *Hunooman Persaud Panday* v. *Munraj Koonweree (Mussamut Babooee)* (1856), 6 M. I. A. 393, at p. 421; 18 W. R. C. R. 81, note; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489; *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481; *Muddun Gopal Lall* v. *Gowrunbutty (Mussamut)* (1875), 15 B. L. R. 264; 23 W. R. C. R. 365; *Adurmoni Deyi* v. *Sib Narain Kur (Chowdhry)* (1877), 3 Calc. 1; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1; S. C. 9 Mad. 343; *Gangulu* v. *Ancha Bapulu* (1881), 4 Mad. 73; *Lakshman Ram Chandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 498; *Kastur Bhavani* v. *Appa* (1876), 5 Bom. 621; *Sadashiv Dinkar Joshi* v. *Dinkur Narayan Joshi* (1882), 6 Bom. 520; *Mahomad Ally* v. *Jehangir* (1900), 2 Bom. L. R. 59; *Ramchandra* v. *Fakirappa* (1900), *ibid.* 450; *Darsu Pandey* v. *Bikarmajit Lal* (1880), 3 All. 125; *Hasmat Rai (Koer)* v. *Sunder Das* (1885), 11 Calc. 396; *Gunga Pershad* v. *Sheodyal Singh* (1879), 5 C. L. R. 224, differing from *Bheknarain Singh* v. *Januk Singh* (1877), 2 Calc. 438; *Yenamandra Sitaramasami* v. *Midatana Sanyasi* (1883), 6 Mad. 400; *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1898), 2 C. W. N. 603; *Hardai Narain* v. *Haruck Dhari Singh* (1882), 12 C. L. R. 104; *Narayana Charya* v. *Narso Krishna* (1876), 1 Bom. 262; *Wajed Hossein (Shah)* v. *Nanku Singh (Baboo)*, 25 W. R. C. R. 311.

[4] *Durgadut Singh* v. *Rameshwar Singh Bahadur (Maharajah Sir)* (1909), 36 I. A. 176; 36 Calc. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901.

[5] *Phul Chand* v. *Man Singh* (1882), 4 All. 309.

virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu law." So the father cannot alienate so as to bind the interest of a son, whose interest in the property has been attached in execution of a decree.[1]

A creditor or alienee, claiming under such charge or alienation, would have to prove that the antecedent debt existed, or that after due inquiries he, in good faith, believed that it existed.[2]

As to a suit for specific performance of an agreement by a father to sell family property, see *Srinivasa Reddi* v. *Sivarama Reddi* (1908), 32 Mad. 320; *Nagiah* v. *Venkatarama Sastrulu* (1912), 37 Mad. 387, differing from *Kosuri Ramaraju* v. *Ivalury Ramalingam* (1903), 26 Mad. 74.

The creditor or alienee need not prove necessity, or inquiries as to necessity,[3] but if he does so his case will be stronger.

A purchaser in execution of a decree need not prove any inquiry.[4]

The burden is then shifted upon the son to prove that the particular debt was contracted for an illegal or immoral purpose, and that the purchaser had notice, or upon reasonable inquiry might have discovered, that it was so contracted.[5] He can put forward such defence even where the money had been borrowed from a third party to pay off such debt.[6]

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[1] *Subraya* v. *Nagappa* (1908), 33 Bom. 264; 10 Bom. L. R. 1206.

[2] *Subramanya* v. *Sadasiva* (1884), 8 Mad. 75. See *Gurusami Sastrial* v. *Ganapathia Pillai* (1882), 5 Mad. 337; *Yenamandra Sitaramasami* v. *Midatana Sanyasi* (1883), 6 Mad. 400; *Chinnaya* v. *Perumal* (1889), 13 Mad. 51; *Jamsetji N. Tata* v. *Kashinath* (1901), 26 Bom. 326, at p. 336; 3 Bom. L. R. 898; *Bhowna (Mussumat)* v. *Roop Kishore* (1873), 5 N. W. P. H. C. 89; *Maharaj Singh* v. *Balwant Singh* (1906), 28 All. 508, at p. 541. Act IV. of 1882, s. 38, *ante*, p. 292.

[3] *Babu Singh* v. *Bihari Lal* (1908), 30 All. 156; see *Debi Dat* v. *Jadu Rai* (1902), 24 All. 459; *Maharaj Singh* v. *Balwant Singh* (1906), 28 All. 508; affirmed on appeal, *Balwant Singh (Raja)* v. *Clancey* (1912), 39 I. A. 109; 34 All. 296; 16 C. W. N. 577; 14 Bom. L. R. 122.

[4] *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717.

[5] *Girdharee Lall* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 106; 5 Calc. 148, at p. 171; 4 C. L. R. 226, at p. 238; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Bhowna (Mussumat)* v. *Roop Kishore* (1873), 5 N. W. P. 89; *Joharmal* v. *Eknath* (1899), 24 Bom. 343; 1 Bom. L. R. 839; *Matadin* v. *Gayadin* (1909), 31 All. 599; *Yenamandra Sitaramasami* v. *Midatuna Sanyasi* (1883), 6 Mad. 400. See *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717; *Kooldeep Kooer (Mussamut)* v. *Runjeet Singh* (1875), 24 W. R. C. R. 231; *Ram Sahoy Singh* v. *Mohabeer Pershad* (1876), 25 W. R. C. R. 185.

[6] *Maharaj Singh* v. *Balwant Singh* (1906), 28 All. 508; affirmed on appeal, *Balwant Singh (Raja)* v. *Clancey* (1912), 39 I. A. 109; 34 All. 292; 16 C. W. N. 577; 14 Bom. L. R. 122.

The exception as to sums for which the father is liable as surety applies apparently to cases of security for appearance, for keeping the peace, or for good behaviour.[1] Where the father was surety for a debt, the liability of his son has been declared in several cases,[2] but it has been held that the liability only occurs when the father received some consideration for being surety.[3]

Crime or fraud.

If the debt was on account of a criminal offence or fraud, or was one which the father as a decent and respectable man ought not to have incurred, or, to use another translation of the expression, "*Avyaharika*," a debt incurred for a cause repugnant to good morals,[4] was the origin of the debt, the sons would not be obliged to recognize it; for instance, a decree for the value of property obtained by theft, a decree for money, or for the value of property misappropriated.[5] This would not apply to a case of money being merely wrongfully retained,[6] or not accounted for,[7] or to a decree for mesne profits obtained against the father by a person whom the father wrongfully kept out of possession of immovable property,[8] or to a decree for damages for interference with a watercourse,[9] or to costs of litigation payable by him,[10] and unconnected with a criminal offence.[11] The fact that the father, as a Government servant, was forbidden to engage in trade does not make debts incurred in trade illegal.[12]

247, 300, 305, 307, 311; "Narada Smriti," chap. iii. para. 11.

[1] Colebrooke, "Digest," vol. i. pp. 246, 247.

[2] *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkitachala Reddiar* (1905), 28 Mad. 377; *Benares (Maharajah of)* v. *Ramkumar Misir* (1904), 26 All. 611; *Tukarambhat* v. *Ganguram Mulchand Gujar* (1898), 23 Bom. 454; *Sitaramayya* v. *Venkatramanna* (1888), 11 Mad. 373; *Rasik Lal Mandal* v. *Singheswar Rai* (1912), 39 Calc. 843; 16 C. W. N. 1103; *Kameswarama* v. *Venkata Subba Row* (1914), 38 Mad. 1120. See *Hira Lal Marwari* v. *Chandrabali Haldarin* (1908), 13 C. W. N. 9.

[3] *Narayan* v. *Venkatacharya Balkrishnacharya* (1904), 28 Bom. 408; 6 Bom. L. R. 434. It is submitted that in this matter there is no difference between the case of a son and that of a grandson.

[4] *Venugopala Naidu* v. *Ramanadhan Chetty* (1912), 37 Mad. 458. The expression is discussed in *Ramkrishna* v. *Narayan* (1915), 40 Bom. 126; 17 Bom. L. R. 955.

[5] *Pareman Das* v. *Bhattu Mahton* (1897), 24 Calc. 672.

[6] *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234. See *Chandra Sen* v. *Ganga Ram* (1880), 2 All. 899; *McDowell and Co.* v. *Ragava Chetty* (1903), 27 Mad. 71; *Jaikumar* v. *Gauri Nath* (1906), 28 All. 718, at p. 720, where it was held that a promissory note given to satisfy a claim for money misappropriated did not create an illegal or immoral debt.

[7] *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Kanemar Venkappayya* v. *Krishna Chariya* (1907), 31 Mad. 161.

[8] *Gurunatham Chetty* v. *Raghavelu Chetty* (1908), 31 Mad. 472.

[9] *Chhakauri Mahton* v. *Ganga Prasad* (1911), 39 Calc. 862; 16 C. W. N. 519; *contrâ Durbar Khachar* v. *Khachar Harsur* (1908), 32 Bom. 348; 10 Bom. L. R. 297, which was dissented from in *Venugopala Naidu* v. *Ramanadhan Chetty* (1912), 37 Mad. 458.

[10] *Peary Lal Sinha* v. *Chandicharan Sinha* (1906), 11 C. W. N. 163.

[11] *Paryag Sahu* v. *Kasi Sahu* (1910), 14 C. W. N. 659. Money borrowed to defend a suit for defamation has been held to be a binding debt, *Sumer Singh* v. *Liladhar* (1911), 33 All. 472.

[12] *Ramkrishna* v. *Narayan* (1915), 40 Bom. 126; 17 Bom. L. R. 955.

Fines need not be paid out of the family property "Neither sins nor the expiation of them are hereditary." [1]

The son's and grandson's liability extends also to the payment of interest,[2] the amount of interest being determinable by the law of the place. Where the rule of *damdupat* [3] is not in force, that rule cannot be put in force.[4]

Interest.

This power which is given to the father cannot be exercised by any other member of the family even in the father's absence.[5]

Power limited to father.

It has been held that when the father is insolvent, the official assignee has the same power as the father.[6]

Except for the purpose of discharging such antecedent debt, or in case of a valid necessity,[7] a father has no power to alienate or charge the coparcenary property,[8] and a sale or mortgage, which has no such justification, can be set aside.[9]

Where a mortgage is given in respect of a debt not antecedent to the transaction,[10] and not incurred for necessary purposes,[11] the Bengal High Court has treated it as a secured debt against the father's interest,[12] but according to the Allahabad High

Mortgage for other debt.

[1] A Bengal case referred to in *Nhanee* v. *Hureeram Dhoolubh* (1814), 1 Borr. 84, at p. 90.

[2] See *post*, p. 322.

[3] The rule of Hindu law forbidding the recovering of interest at any one time in excess of the amount of principal. *Ante*, p. 8.

[4] *Pran Krishna Tewary* v. *Jadu Nath Trivedy* (1898), 2 C. W. N. 603.

[5] *Hari Premji (Patel)* v. *Hakamchand* (1884), 10 Bom. 363.

[6] *Fakirchand Motichand* v. *Motichand Hurruckchand* (1883), 7 Bom. 438; *Rangayya Chetti* v. *Thanikachalla Mudali* (1895), 19 Mad. 74. In the former case it was further held that the official assignee can deal with the estate after the death of the father. It is submitted that this is not good law.

[7] *Ante*, pp. 285, 286.

[8] *Narain Prasad* v. *Sarnam Singh* (1917), 44 I. A. 163; *Chinnaya* v. *Perumal* (1889), 13 Mad. 51.

[9] See *Ram Dayal* v. *Ajudhia Prasad* (1906), 28 All. 328; *Beer Kishore Suhye Singh (Baboo)* v. *Har Bullub Narain Singh (Baboo)* (1867), 7 W. R. C. R. 502; *Chandra Deo Singh* v. *Mata Prasad* (1909), 31 All. 176.

[10] See *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Laljee Sahoy* v. *Fakeer Chand* (1880), 6 Calc. 135, at p. 138; 7 C. L. R. 97, at p. 100; *Gunga Prosad* v. *Ajudhia Pershad* (1881), 8 Calc. 131; 9 C. L. R. 417; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Debi Dat* v. *Jadu Rai* (1902), 24 All. 459, differing from *Jamna* v. *Nain Sukh* (1887), 9 All. 493; *Sami Ayyangar* v. *Ponnammal* (1897), 21 Mad. 28; *Hanuman Kamat* v. *Dowlut Mundar* (1884), 10 Calc. 528; *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613, dissenting from *Maheswar Dutt Tewari* v. *Kishun Singh* (1907), 34 Calc. 184; 11 C. W. N. 294, in which latter case it was held, it is submitted erroneously, that the sons were bound by a mortgage not in respect of a debt, which was antecedent to the transaction. The decisions relied upon in the latter case were in cases relating to sales in execution of decrees, and therefore stand upon a different footing. As to impartible estates, see *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484.

[11] *Ante*, pp. 285, 286.

[12] *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1907), 34 Calc. 735; 11 C. W. N. 613; *Khalilul*

Court it cannot be so treated.[1] The view of the latter Court has been accepted by the Judicial Committee.[2]

As a mortgage of an undivided share is permissible in Bombay and Madras,[3] in those Presidencies the debt might, it is submitted, be treated as a secured debt against the father's interest.

While the father is alive the interest of the sons in the coparcenary property is not liable on account of an alienation by the father which was incurred neither for necessity nor in respect of an antecedent debt. They may be liable for his debts after his death,[4] but in that case the limitation applicable to an unsecured debt would apply.[5]

So (except so far as questions of limitation are concerned, and except in cases where the property had been dealt with before suit) there was, according to recent decisions, generally no substantial difference between the remedy on a mortgage which is based on an antecedent debt and a mortgage given in consideration of a payment at the time,[6] but the law on this subject has now been clearly settled by the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1917), 44 I. A. 126; 21 C. W. N. 698; 19 Bom. L. R. 498.

Rahman v. *Gobind Pershad* (1892), 20 Calc. 328, at p. 327; *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 342, at p. 353; 17 C. W. N. 1025 note. The proper form of decree is a mortgage decree against the share of the father, and if that share be insufficient to pay the debt, interest, and costs, then for the balance by sale of the son's interest in the coparcenary property so far as necessary: *Krishna Prasad (Babu)* v. *Ramperschad Singh (Babu)* (1916), 20 C. W. N. 508.

[1] *Chandra Deo Singh* v. *Mata Prasad* (1909), 31 All. 176; *Kali Shankar* v. *Nawab Singh* (1909), 31 All. 507; *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1911), 33 All. 783.

[2] *Narain Prasad* v. *Sarnam Singh* (1917), 44 I. A. 163; *Sahu Ram Chandra* v. *Bhup Singh* (1917), 44 I. A. 126; 21 C. W. N. 698; 19 Bom. L. R. 498.

[3] *Ante*, p. 301.

[4] See *Sahu Ram Chandra* v. *Bhup Singh* (1917), 44 I. A. 126; 21 C. W. N. 698; 19 Bom. L. R. 498; *Jogi Das* v. *Ganga Ram* (P. C.) (1917), 21 C. W. N. 957. For older cases see *Dattatraya* v. *Vishnu* (1911), 36 Bom. 68; 13 Bom. L. R. 1161; *Chintamanrav* v. *Kashinath* (1889), 41 Bom. 320, and cases below, note 5.

[5] *Brijnandan Singh* v. *Bidya Prasad Singh* (1915), 42 Calc. 1068; S. C. *Bidya Prasad* v. *Bhupnarain Singh*, 19 C. W. N. 849, overruling *Maheshwar Dutt Tewari* v. *Kishen Singh* (1907), 34 Calc. 184; 11 C. W. N. 294; *Biswanath Prasad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 342; 17 C. W. N. 1025; and *Sheo Narain Ray* v. *Mokshoda Das Mittra* (1913), 17 C. W. N. 122; *Surja Prasad* v. *Golab Chand* (1900), 27 Calc. 762, differed from in *Maheswar Dutt Tewari* v. *Kishun Singh* (1907), 34 Calc. 184; 11 C. W. N. 294, see *ante*, p. 313, note 10; *Hira Lal Marwari* v. *Chandrabali Haldarin* (1908), 12 C. W. N. 9. See *Ran Singh* v. *Sobha Ram* (1907), 29 All. 544. As to limitation, see *ante*, p. 306, and *post*, p. 322.

[6] See *Chidambara Mudaliar* v. *Koothaperumal* (1903), 27 Mad. 326, at p. 328. In this case it was said, "on principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the

The limitation for a suit on a mortgage by the father is twelve years from the time when the money becomes due.[1]

It is now settled law that where the debt was not antecedent to the mortgage, the creditor had no rights against the coparcenary property except in case of necessity.[2]

Where there is a sale by the father, not on account of an antecedent debt, it has been held that the sons cannot, unless the money was obtained for illegal or immoral purposes, set it aside without refunding the amount of the purchase-money, as the purchase-money would be a debt which they would be liable to pay,[3] but it is submitted that there is no such liability.[4]

The question as to whether the mortgage or transfer passed the whole property, or only the father's interest therein, depends upon what the parties contracted about.[5]

Question whether alienation passed property.

This may be determined not only by the terms of the document, but also by the surrounding circumstances. The burden is upon the person claiming under the mortgage or sale.[6]

As to whether sons can be bound by a decree enforcing a mortgage on coparcenary property made by their father, and passed in a suit to which they are not parties, see *ante*, pp. 280–282.

Whether sons bound if not parties to suit.

Where the sons are not parties to the suit, they are entitled to have an opportunity, either in a fresh suit or in proceedings for execution of the decree,[7] of raising such questions and of asserting such rights as they could have raised and asserted if they had been made parties.

Rights of sons when not parties.

They can dispute the *factum* of the debt, or they can show that the debt was incurred for illegal or immoral purposes,[8] or that it does not bind them otherwise.

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father's debt." See *Gunga Pershad* v. *Sheo lyal Singh* (1881), 9 C. L. R. 417; judgment of Banerji, J., in *Chandradeo Singh* v. *Mata Prasad* (1909), 31 All. 176, at p. 216.

[1] Act IX. of 1908, sch. I. art. 132; *Sheo Narain Ray* v. *Mokshoda Das Mittra* (1913), 17 C. W. N. 122.

[2] *Sahu Ram Chandra* v. *Bhup Singh* (1917), 44 I. A. 126; 21 C. W. N. 698; 19 Bom. L. R. 498; *Hanuman Kamat* v. *Dowlut Mundar* (1884), 10 Calc. 528; *Lal Singh* v. *Deonarain Singh* (1886), 8 All. 279; *Arunachala Chetti* v. *Munisami Mudali* (1883), 7 Mad. 39.

[3] *Hasmat Rai (Koer)* v. *Sunder Das* (1885), 11 Calc. 396. See *post*, pp. 321, 322, and *Nathu Lal Chowdhry* v. *Chadi Sahi* (1869), 4 B. L. R. A. C. 15; 12 W. R. C. R. 447.

[4] See *Sahu Ram Chandra* v. *Bhup Singh* (1917), 44 I. A. 126; 21 C. W. N. 698; 19 Bom. L. R. 498.

[5] See *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77, at p. 83; 14 Calc. 572, at p. 579.

[6] *Narayanrav Damodar* v. *Balkrishna Mahadeo*, Bom. P. J., 1881, p. 293.

[7] See *Umahesuara* v. *Singaperumal* (1885), 8 Mad. 376; *Chander Pershad* v. *Sham Koer* (1905), 33 Calc. 676. It has been held that the son cannot raise the question in the same suit where he has been made a party to the suit as representing his father: *Hira Lal Sahu* v. *Parmeshar Rai* (1899), 21 All. 356.

[8] *Ramkrishna* v. *Vinayak Narayan*

They can get a right to redeem,[1] but a suit for redemption does not lie simply on the ground that they have not been made parties.[2] A son born after a decree for sale would have no right of redemption.[3]

"Independently of the" Transfer of Property Act (or of the Civil Procedure Code), "the position of a purchaser, who in a sale in execution of a degree against the father bought the entirety of the estate, is the same as regards the son, whether the decree was a mortgage decree or a decree for money. In either case, all that the son can claim is that not having been a party to the sale of the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale."[4]

A son who was not joint with the father at the time of the suit would be entitled to redeem.[5]

The son does not lose his right to redeem, where the mortgagee obtains only a money decree and attaches the mortgaged property.[6]

Where the son has been a party to the suit he could not, of course, raise in another suit any question as to the validity of the mortgage or sale.

When the sons are not parties to the suit against their father, the creditor may institute another suit against them.[7]

When interests of sons pass by sale in execution.

The interests of the sons pass in a sale of coparcenary property in execution of a decree against their father,[8] except only[9]—

1. When their interests are not sold.[10]

(1910), 34 Bom. 354; 12 Bom. L. R. 219; *Mata Din* v. *Gaya Din* (1909), 31 All. 599; *Indar Pal* v. *Imperial Bank* (1915), 37 All. 214.

[1] See *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at p. 69; *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar* (1884), 8 Bom. 481, at p. 488; *Ramasamayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222; *Balkesen Lal* v. *Chowdhuri Tapesur Singh* (1911), 17 C. W. N. 219.

[2] *Lal Singh* v. *Palandar Singh* (1905), 28 All. 182; *Debi Singh* v. *Jia Ram* (1902), 25 All. 214; *Kehri Singh* v. *Chunni Lal* (1911), 33 All. 436.

[3] *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372; *ante*, pp. 304, 305, 311.

[4] *Ramasammayyan* v. *Virasami Ayyar* (1898), 21 Mad. 222, at p. 224; *Kunhali Beari* v. *Keshava Shanbaga* (1887), 11 Mad. 64, at p. 76. *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16. See *post*, p. 317.

[5] See *Trimbak Balkrishna* v. *Narayan Damodhar Dabholkar* (1884), 8 Bom. 481.

[6] *Sardar Singh* v. *Ratan Lal* (1914), 36 All. 516.

[7] See *Ran Singh* v. *Sobha Ram* (1907), 29 All. 544; *Dharam Singh* v. *Angan Lal* (1899), 21 All. 301; *Ariabudra* v. *Dorasami* (1888), 11 Mad. 413.

[8] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Nanomi Babuasin (Mussamut)* v. *Modun Mohun* (1885), 13 I. A. 1; 13 Calc. 21; *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Cooverji Hirji* v. *Dewsey Bhoju* (1893), 17 Bom. 718; *Ramphul Singh* v. *Degnarain Singh*, 8 Calc. 617; 10 C. L. R. 489; *Beni Parshad* v. *Puran Chand* (1895), 23 Calc. 262, at p. 274; *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234; *Gonesh Pandey* v. *Dabee Doyal Singh* (1879), 5 C. L. R. 36.

[9] *Mata Din* v. *Gaya Din* (1909), 31 All. 599.

[10] See *post*, pp. 319, 320.

2. When the sons prove that the debt was contracted for an illegal or immoral purpose,[1] and the execution creditor purchases, or, if a stranger purchases, and has notice of, or upon inquiry could have ascertained, the illegal or immoral character of the debt upon which the decree was based.[2]

They could also dispute the fact of the debt.[3]

Decree for money.

A decree for a mere money debt of the father,[4] not illegal or immoral, and whether incurred for family purposes or not, may be enforced in his lifetime by an execution sale of the entire coparcenary estate,[5] and is binding on the sons, whether they were or were not parties to the suit.[6] They are, however, entitled in case they were not parties to contest the fact or the binding nature of the debt in another suit,[7] or by a claim under the Civil Procedure Code (Act V. of 1908), Sched. I., Order XXI. r. 57.[8]

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[1] See *ante*, pp. 309–312.

[2] See *Joharmal* v. *Eknath* (1899), 24 Bom. 343; 1 Bom. L. R. 839; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *ante*, pp. 309–312.

[3] See *Nanomi Babuasin (Mussumat)* v. *Modun Mohun* (1885), 13 I. A. 1, at p. 18; 13 Calc. 21, at p. 36; *ante*, p. 315.

[4] This includes a decree for the unsatisfied balance of a mortgage debt, *Hari Ram* v. *Bishnath Singh* (1900), 22 All. 408.

[5] *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Khalilul Rahman* v. *Gobind Pershad* (1892), 20 Calc. 328; *Sheo Proshad* v. *Jung Bahadoor* (1882), 9 Calc. 389; 12 C. L. R. 494; *Narayana Charya* v. *Narso Krishna* (1876), 1 Bom. 262; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Bhowna (Mussumat)* v. *Roop Kishore* (1873), 5 N. W. P. 89.

[6] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 331; 14 B. L. R. 187, at p. 199; 22 W. R. C. R. 56, at p. 59. The facts of this case are to be found in *Ponnappa Pillai* v. *Pappuvayyangar* (1885), 9 Mad. 343, at pp. 345–349; *Nanomi Babuasin* v. *Modun Mohun* (1885), 13 I. A. 1; 13 Calc. 21; *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 106; 5 Calc. 148, at p. 171; 5 C. L. R. 226, at p. 238; *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (1888), 16 I. A. 1; 12 Mad. 142; *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16; *Mathura Prasad* v. *Ramchandra Rao* (1902), 25 All. 57; *Mallesam Naidu* v. *Jugala Panda* (1899), 23 Mad. 292; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Kunhali Beari* v. *Keshava Shanbaga* (1887), 11 Mad. 64; *Ramanadan* v. *Rajagopala* (1889), 12 Mad. 309; *Ramdut Sing* v. *Mahender Prasad* (1882), 9 Calc. 452; 12 C. L. R. 47; *Dattatraya* v. *Vishnu* (1911), 36 Bom. 68; 13 Bom. L. R. 1161. See *Shiam Lal* v. *Ganeshi Lal* (1905), 28 All. 288, where the suit had been dismissed as against the son.

[7] See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Gopalasami Pillai* v. *Chokalingam Pillai* (1881), 4 Mad. 320; *Devji* v. *Sambhu* (1899), 24 Bom. 135; *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (1886), 11 Bom. 37; *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16.

[8] *Shivram* v. *Sakharam* (1908), 33 Bom. 39; 10 Bom. L. R. 39; *Umed*

In two cases the Allahabad High Court [1] considered that where no sale had taken place, the sons could contest the decree on the sole ground that they were not parties to it, but in a latter case the same Court held that there is no ground for such distinction.[2]

Irregularity in sale.

The son's rights do not pass when in contravention of sec. 99 of the Transfer of Property Act [3] the mortgagee has attached the property in execution of a money decree,[4] or the sale is otherwise irregular.

Execution of decree after death of father.

A creditor can, after the death of the father, execute the decree against coparcenary property in the hands of the sons.[5]

The provisions of the Civil Procedure Code, 1908, on this subject are as follows:—

Legal representative.

"Sec. 50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

"(2) Where the decree is executed against such legal representative he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

Enforcement of decree against legal representative.

"Sec. 52. (1) Where the decree is passed against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property:

"(2) Where no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

Liability of ancestral property.

"Sec. 53. For the purposes of sec. 50 and sec. 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative." [6]

As the law stood before the 1st January, 1909, where the property had been attached in the father's lifetime the creditor could proceed;[7] but where

Hathising v. *Goman Bhaiji* (1895), 20 Bom. 385, at p. 389; *Ram Dayal* v. *Durga Singh* (1890), 12 All. 209. See *Venkataramayyan* v. *Venkatasubramania Dikshatar* (1878), 1 Mad. 358.

[1] *Ram Dayal* v. *Durga Singh* (1890), 12 All. 209; *Jagraj Singa* v. *Ajudhia Prasad* (1886), 9 All. 142.

[2] *Karan Singh* v. *Bhup Singh* (1904), 27 All. 16.

[3] Act IV. of 1882.

[4] *Muthuraman Chetti* v. *Ettapasami* (1899), 22 Mad. 372.

[5] Act V. of 1908 (Civil Procedure), s. 53.

[6] *Sankar Nath Pundit* v. *Madan Mohan Das* (1909), 14 C. W. N. 298.

[7] *Peary Lal Sinha* v. *Chandi Charan Sinha* (1906), 11 C. W. N. 163; *Beni Pershad* v. *Parbati Koer* (1892), 20 Calc. 895.

there was no such attachment, a new suit was necessary according to the High Courts of Madras and Allahabad, and according to some of the Bengal decisions.[1] It was held in Bombay,[2] and by the majority of a Full Bench in Bengal,[3] that the decree could be executed against the sons.

The carrying out of a mortgage decree stood upon the same footing.[4]

If the coparcenary property has been charged by the decree, proceedings in execution could be taken against the sons after the death of the father.[5]

When sons' interests pass by sale.

The question whether the sale in execution of a decree against the father passed the whole interest of the family, or only the father's undivided interest, depends upon the terms of the proceedings in execution. The Court will look at the substance of the proceedings to see what was intended to be sold, and what the purchaser could reasonably think he was buying.[6] It is a mixed question of law and fact.[7]

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[1] *Lachmi Narain* v. *Kunji Lall* (1894), 16 All. 449; *Jagannath Prasad* v. *Sitaram* (1888), 11 All. 302; *Kali Charan* v. *Jewat* (1905), 28 All. 51; *Zamindar of Karvetnagar* v. *Trustee of Tirumelai* (1909), 32 Mad. 429; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Ariabudra* v. *Dorasami* (1888), 11 Mad. 413; *Venkatarama* v. *Senthivelu* (1890), 13 Mad. 265; *Karnataka Hanumantha* v. *Andukuri Hanumayya* (1882), 5 Mad. 232; *Juga Lal Chaudhuri* v. *Audh Behari Prosad Singh* (1900), 6 C. W. N. 223; *Suraj Prosad (Lala)* v. *Golab Chund* (1901), 28 Calc. 517; *Kali Krishna Sarkar* v. *Raghunath Deb* (1903), 31 Calc. 224.

[2] *Govind Krishna Gujar* v. *Sakharan Naraya* (1904), 28 Bom. 383; 6 Bom. L. R. 344; *Umed Hathising* v. *Goman Bhaiji* (1895), 20 Bom. 385.

[3] *Amar Chandra Kundu* v. *Sebak Chand Chowdhury* (1907), 34 Calc. 642; 11 C. W. N. 593.

[4] *Beni Pershad* v. *Parbati Koer* (1892), 20 Calc. 895.

[5] *Sivagiri Zamindar* v. *Tiruvengada* (1884), 7 Mad. 339; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1.

[6] *Pettachi Chettiar* v. *Sangili Veera Pandia* (1887), 14 I. A. 84, at p. 85; 10 Mad. 241, at p. 248; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77, at p. 83; 14 Calc. 572, at p. 579; *Abdul Aziz Khan Sahib* v. *Appayasami Naicker* (1903), 31 I. A. 1; 27 Mad. 131; 8 C. W. N. 180; *Sripat Singh* v. *Tagore* (1916), 44 I. A. 1; 21 C. W. N. 442. See *Umbica Prosad Tewary* v. *Ramsahay Lall* (1881), 8 Calc. 898; 10 C. L. R. 505; (1881), 8 Calc. 10 C. L. R. 505; *Kagal Ganpaya* v. *Manjappa* (1888), 12 Bom. 691; *Hitendra Singh* v. *Rameshur Singh* (1913), 18 C. W. N. 42.

[7] In the following cases it was held that the interest of the father only passed by the sale: *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247; 3 Calc. 198; 1 C. L. R. 49; *Simbhunath Panday* v. *Golab Singh* (1887), 14 I. A. 77; 14 Calc. 572; *Hurdey Narain Sahu (Baboo)* v. *Rooder Perkash Misser (Pundit Baboo)* (1883), 11 I. A. 26; 10 Calc. 626; *Ram Sahai* v. *Kewal Singh* (1887), 9 All. 672; *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar* (1887), 14 I. A. 84; 10 Mad. 241; *Bhikaji Ramchandra Oke* v. *Yashvantrav Shripat Khopkar* (1884), 8 Bom. 489; *Maruti Sakharam* v. *Babaji* (1890), 15 Bom. 87; *Beni Pershad* v. *Puran Chand* (1895), 23 Calc. 262; *Bika Singh* v. *Lachman Singh* (1880), 2 All. 800; *Chandra Sen* v. *Ganga Ram* (1880), 2 All. 899; *Bhagwat Dassa* v. *Gouri Kunwar* (1880), 7 C. L. R. 218; *Collector of Monghyr* v. *Hurdai Narain Shahai* (1879), 5 Calc. 425; 5 C. L. R. 112. In the following cases it was held that the interests of the sons passed by the sale: *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 717; *Meenakshi Naidu* v. *Immudi Kanaka Ramaya*

Where interests have been expressly excluded they would of course not pass.[1]

It is the duty of the judgment creditor to see that the orders of attachment and sale, or the sale certificate, clearly indicate the sale of all the interests in the property over which the judgment debtor had control.

Burden of proof.

There is some conflict as to whether there is any presumption that the whole interest passed,[2] or whether there is a presumption that the interest of the father only passed.[3] It is submitted that if there is any burden of proof one way or the other, it is upon the person supporting the sale.[4]

Duty of purchaser.

"The purchaser under the execution. . ." is "not bound to go further back than to see that there was a decree against" the father, "that the property was property liable to satisfy the decree, if the decree had been properly given against" him, "and having inquired into that, and having *boná fide* purchased the estate under the execution and *boná fide* paid a valuable consideration for the property, the" sons "are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the" purchaser.[5]

"If his debt was of a nature to support a sale of the entirety," the father "might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is, that, not being parties to the sale or execution proceedings, they ought not to be barred from bringing the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone, . . . the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the

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Kounden (1888), 16 I. A. 1; 12 Mad. 142; *Mahabir Pershad (Rai Babu)* v. *Markunda Nath Sahai (Rai)* (1889), 17 I. A. 11; 17 Calc. 584; *Sripat Singh* v. *Tagore* (1916), 44 I. A. 1; 21 C. W. N. 442; *Cooverji Hirji* v. *Dewsey Bhoja* (1893), 17 Bom. 718; *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484; *Kunhali Beari* v. *Keshava Shanbaga* (1887), 11 Mad. 64; *Sakharamshet* v. *Sitaramshet* (1886), 11 Bom. 42; *Sadashiv Dinkar Joshi* v. *Dinkarnarayan Joshi* (1882), 6 Bom. 529. As to a sale under a mortgage decree, see *ante*, pp. 280–282.

[1] *Timmappa* v. *Narsinha Timaya* (1913), 37 Bom. 631; 15 Bom. L. R. 794.

[2] See *Muhammad Husain* v. *Dipchand* (1892), 14 All. 191; *Pem Singh* v. *Partab Singh* (1892), 14 All. 179; *Beni Madho* v. *Basdeo Patak* (1890), 12 All. 99.

[3] *Maruti Sakharam* v. *Babaji* (1890), 15 Bom. 87; *Manohar* v. *Balvant* (1901), 3 Bom. L. R. 97.

[4] See *Haza Hira* v. *Bhaiji Madan Isabji*, Bom. P. J. 1875, p. 97.

[5] *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321, at p. 334; 14 B. L. R. 187, at p. 200; 22 W. R. C. R. 56, at p. 59. In *Mahabir Prasad* v. *Basdeo Singh* (1884), 6 All. 234, the Court considered that a statement in the plaint amounted to notice. See *Bhagbut Pershad* v. *Girja Koer (Mussumat)* (1888), 15 I. A. 99; 15 Calc. 317; *Siva Sankara Mudali* v. *Parvati Anni* (1881), 4 Mad. 96; *Luchmi Dai Koori* v. *Asman Sing* (1876), 2 Calc. 213; 25 W. R. C. R. 421; *Anooragee Kooer (Mussamut)* v. *Bhugobutty Kooer* (1876), 25 W. R. C. R. 148; *Budree Lall* v. *Kantee Lall* (1875), 23 W. R. C. R. 260. Cf. *Abdool Kureem (Shaikh)* v. *Jaun Ali (Syed)* (1872), 18 W. R. C. R. 55.

entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." [1]

A decree may be obtained against the sons during the lifetime of their father so as to bind the coparcenary property, provided that the money was not raised for an illegal or immoral purpose.[2] **Decree against sons.**

Although the coparcenary property may not be liable, the father remains personally liable for a debt, and his share may be sold in execution of a decree.[3] **Personal liability of father.**

In cases where it is competent for a coparcener to sell his share of the coparcenary property,[4] the father's share would be bound by the sale even when the sons are not bound, but specific performance of an agreement to sell will not be granted.[5]

The debts of a father, or paternal grandfather, even when not charged upon the estate, must be paid by the son, or grandson, out of the property of the coparcenary in which the debtor was a coparcener, provided such debts have not been incurred for an illegal or immoral purpose.[6] **Simple contract debts of father.**

This does not include an agreement to pay a sum of money in perpetuity.[7]

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1 *Nanomi Babuasin* (*Mussamut*) v. *Modun Mohun* (1885), 13 I. A. 1, at p. 18; 13 Calc. 21, at p. 36. See *Bhagbut Pershad* v. *Girja Koer* (*Mussamat*) (1888), 15 I. A. 99; 15 Calc. 317.

2 See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Ramphul Singh* v. *Degnarain Singh* (1881), 8 Calc. 517; 10 C. L. R. 489.

3 *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (1912), 40 Calc. 342, at p. 353; 17 C. W. N. 1025, note. As to the rights of a mortgagee after the father's share has been sold, see *Jaleshar Rai* v. *Anrut Rai* (1913), 35 All. 302.

4 *Ante*, pp. 301, 302.

5 *Nagiah* v. *Venkatarama Sastrulu* (1912), 37 Mad. 387, differing from *Kosuri Ramaruju* v. *Ivalury Ramalingam* (1903), 26 Mad. 74, and *Srinivasa Reddi* v. *Sivarama Reddi* (1909), 32 Mad. 320; Act I. of 1877 (Specific Relief), s. 15. See *Poraka Subbarami Reddi* v. *Vadlamudi Seshachalam Chetty* (1910), 33 Mad. 359.

6 *Muddun Thakoor* v. *Kantoo Lall* (1874), 1 I. A. 321; 14 B. L. R. 187; 22 W. R. C. R. 56; *Luchmun Dass* v. *Giridhur Chowdhry* (1880), 5 Calc. 855; 6 C. L. R. 473; *Periasami Mudaliar* v. *Seetharama Chettiar* (1903), 27 Mad. 243; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76, at pp. 83, 84; *Bhagirathi* v. *Anantha Charia* (1893), 17 Mad. 268; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1; *Sheo Proshad* v. *Jung Bahadoor* (1882), 9 Calc. 389; 12 C. L. R. 494; *Velliyammal* v. *Katha Chetti* (1882), 5 Mad. 61; *Narayanasami Chetti* v. *Samidas Mudali* (1883), 6 Mad. 293. This applies equally to an impartible estate: *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (1882), 9 I. A. 128; 6 Mad. 1; *Veera Soorappa Nayani* v. *Errappa Naidu* (1906), 29 Mad. 484.

7 *Balkrishna* v. *Janardana* (1904), 6 Bom. L. R. 642.

Interest.

The liability to pay a debt involves a liability to pay interest.[1]

Liability of son during father's lifetime.

Even during the lifetime of the father the son is liable to the extent of the coparcenary property, or of property of his father which comes into his hands; as, for instance, when the father has abandoned worldly affairs,[2] or has been absent for such a time as will raise a presumption as to his death.[3]

Limitation of suit.

The limitation for a suit against the son for a debt of his father is as provided by Article 120 of Schedule I. of the Limitation Act,[4] *i.e.* six years from the time when the cause of action arose.[5]

It has been held that the right of the creditor to sue the sons accrues during the father's lifetime, and that there is not a new cause of action on his death.[6]

As to the limitation for a suit to set aside an alienation by the father, see *ante*, p. 306.

Debt not a charge on property. Effect of alienation.

A simple contract debt even of a father is not a charge upon the coparcenary property, or upon his separate property. When the son or heir has alienated the property, the creditor cannot claim his debt against the alienee, except where the alienation has been, to the knowledge of the alienee, made in order to avoid the debt, or with the intention of avoiding it, in which case the remedy of the creditor is against the son or heir personally.[7]

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[1] *Lachman Das* v. *Khunnu Lal* (1896), 19 All. 26. See *Saunadanappa* v. *Shivbasawa* (1907), 31 Bom. 354; *ante*, p. 313.

[2] See Colebrooke's "Digest," vol. i. p. 266.

[3] An absence of twenty years was fixed by Vishnu (Colebrooke's "Digest," vol. i. p. 266); but the presumptions as to death now applicable are to be found in ss. 107, 108, of the "Indian Evidence Act" (I. of 1872).

[4] IX. of 1908. *Hiralal Marwari* v. *Chandrabali Haldarin* (1908), 13 C. W. N. 9.

[5] *Maharaj Sing* v. *Balwant Singh* (1906), 28 All. 508, at p. 516; affirmed on appeal, *Balwant Singh* (*Raja*) v. *Clancy* (1912), 39 I. A. 109; 39 All. 296; 16 C. W. N. 577; 14 Bom. L. R. 422; *Brijnandan Singh* v. *Bidya Prasad Singh* (1915), 42 Calc. 1068; S. C. *Bidhya Prasad* v. *Bhupnarain Singh*, 19 C. W. N. 849; *Narsingh Misra* v. *Lalji Misra* (1901), 23 All. 206; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99; *Ramayya* v. *Venkataratnam* (1893), 17 Mad. 122.

[6] *Mallesam Naidu* v. *Jugala Panda* (1899), 23 Mad. 292. See *Ramasami Nadan* v. *Ulaganatha Goundan* (1898), 22 Mad. 49; *Natasayyan* v. *Ponnusami* (1892), 16 Mad. 99.

[7] *Zuburdust Khan* v. *Indurmun* (1867), Agra High Court Full Bench Reports, ed. 1903, p. 71; ed. 1874, p. 55; *Unnopoorna Dassea* v. *Gunga Narain Paul* (1865), 2 W. R. C. R. 296; *Jamiyatram Ramchandra* v. *Parbhudas Hathi* (1872), 9 Bom. H. C. 116; *Gnanabhai* v. *C. Srinivasa Pillai* (1868), 4 Mad. H. C. 84; *Greender Chunder Ghose* v. *Mackintosh* (1879), 4 Calc. 897; 4 C. L. R. 193; cf. Act IV. of 1882 (Transfer of Property), s. 128. The right of a creditor against an alienee or devisee of the heir would apparently be no greater than his right against the alienee or devisee of his debtor, see *Bishen Chand* (*Rai*) v. *Asmaida Koer* (*Mussumat*) (1883), 11 I. A. 164; 6 All. 560.

The debts of the father cannot be recovered from the separate property of a son, even where such property has been the subject of a *bonâ fide* gift to the son by the father. They can only be recovered from the coparcenary property, or from property which was acquired by his sons on his death as his representatives.[1]

Remedy limited to assets.

A son is not liable for debts incurred after his separation from his father.[2] In the Bombay Presidency it is expressly provided [3] that an heir is only liable for the debts of a deceased ancestor to the extent of assets received

A creditor cannot enforce the payment of the debt of the father [4] against property which has been allotted on partition to the son, unless the partition was effected for the purpose of avoiding the father's debts.[5]

Liability after partition.

As under the Bengal school of law sons do not acquire any interest by birth in ancestral property, a father can obviously charge his share in the coparcenary property for the payment of any of his debts, however incurred,[6] and after his death the payment of his debts can be enforced against the property, whether joint or separate, belonging to him at the time of his decease.

Bengal school.

Apart from the obligation of a son or grandson to pay the debts of his father or grandfather out of coparcenary property, the Hindu law, like other systems of law, requires the person who succeeds to the property of another as heir or devisee, to

Obligation to pay debts out of assets inherited, etc.

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[1] *Dyamonee Debea* v. *Brindabun Chunder Banerjea*, Ben. S. D. A. 1856, p. 97; *Ponnappa Pillai* v. *Pappuvayyangar* (1881), 4 Mad. 1, at pp. 9, 21, 45; *Keval Bhagvan Gujar* v. *Ganpati Narayan* (1883), 8 Bom. 220; *Girdharlal Krishnavalabh* v. *Shiv (Bai)* (1884), 8 Bom. 309; *Omuthoonnissa (Mussamut)* v. *Puresmun Narain Singh* (1876), 25 W. R. C. R. 202; *Sakharam Ramchandra Dikshit* v. *Govind Vaman Dikshit* (1873), 10 Bom. H. C. 361; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Lallu Bhagvan* v. *Tribhuvan Motiram* (1889), 13 Bom. 653; *Nathuni Sahu* v. *Baijnath Prasad* (1917), 2 Pat. L. J. 212. See *Dheraj Mahatab Chand Bahadoor (Maharajah)* v. *Huro Mohun Acharjee*, W. R. (1864), M. R. 1; *Jummal Ali* v. *Tirbhee Lall Dass* (1869), 12 W. R. C. R. 41; *Sangili Virapandia Chinnathambiar* v. *Alwar Ayyangar* (1881), 3 Mad. 42. Act VII. (Bo. C.) of 1866.

[2] *Kulada Prasad Pandey* v. *Haripada Chatterjee* (1912), 40 Calc. 407; 17 C. W. N. 102.

[3] Act VII. (Bo. C. of 1866), s. 2.

[4] This would not apply to a debt or a contract before partition entered into by the father as manager of the family: *Ramachandra Padayachi* v. *Kondayya Chetti* (1901), 24 Mad. 555; *Kameswarama* v. *Venkata Subba Row* (1914), 38 Mad. 1120.

[5] *Krishnasami Konan* v. *Ramasami Ayyar* (1899), 22 Mad. 519.

[6] See *ante*, p. 299.

pay the legal debts of such other person, whatever may be the purpose of such debts, to the extent of the assets received by him.[1] There is no obligation upon any other coparcener, who has acquired rights by survivorship to pay the debts of the deceased coparcener.[2]

Debts can be recovered from the person who has wrongfully come into possession of the property of the deceased debtor.[3]

This would not apply to lands held on a tenure, which rendered it not transferable or saleable in execution of a decree.[4]

Impartible property.

The question as to whether the debts of the holder of an impartible estate must be paid by his successor is not quite settled. It is clear that they are so payable in a case governed by the Bengal school of law, or in a case governed by the Mitakshara school where the property has passed to a female heir, or to a separated kinsman, or where it has passed to a son or son's son, and it was not incurred for illegal or immoral purposes; also in any case where it was incurred for the necessities of the property. The question remains whether in a case governed by the Mitakshara law a son or son's son is bound to pay the debt, although it was incurred for an immoral or illegal purpose, and whether an undivided collateral successor is bound to pay although it was not incurred for a necessary purpose. The Courts have differed on this question.[5] It is submitted that as the property is not coparcenary,[6] the son or other heir is bound to pay out of the property any legal debt irrespective of its origin or purpose.[7]

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[1] W. Macnaghten's "Hindu Law," ii. p. 284; Colebrooke's "Digest," vol. i. 270; "Vyavahara Mayukha," chap. v. s. 4, para. 17; "Dayabhaga," chap. i. para. 47; "Narada Smriti," chap. iii. para. 22; cf. Act. V. of 1881, ss. 101–105.

[2] As to the sale of a share, see *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1881), 3 Mad. 145, at p. 167. As to impartible property, see *Nachiappa Chettiar* v. *Chinnayasami Naicker* (1906), 29 Mad. 453; *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (1909), 32 Mad. 429; *Rajah of Kalahasti* v. *Achigadu* (1905), 30 Mad. 454.

[3] See *Magaluri Garudiah* v. *Narayana Rungiah* (1881), 3 Mad. 359; *Kanakamma* v. *Venkataratnam* (1884), 7 Mad. 586; *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (1878), 4 Calc. 342; 3 C. L. R. 154; *Surbomungola Dabee* v. *Mohendronath Nath* (1874), 4 Calc. 508; *Khitish Chandra Acharjya Chowdhury* v. *Radhika Mohun Roy* (1907), 35 Calc. 276; 12 C. W. N. 237.

[4] See *Nilmoni Singh (Rajah)* v. *Bakranath Singh* (1882), 9 I. A. 104; *Jagjivandas Javerdas* v. *Imdad Ali* (1882), 6 Bom. 211; *Muppidi Papaya* v. *Ramana* (1883), 7 Mad. 85; *Anundo Rai* v. *Kali Prosad Singh* (1884), 10 Calc. 677; S. C. on appeal, *Kali Pershad Singh (Tekait)* v. *Anund Roy* (1887), 15 I. A. 19; 15 Calc. 471; *Appaji Bapuji* v. *Keshav Shamrav* (1890), 15 Bom. 13. As to the liability of a person who intermeddles with the assets, see *Khitish Chandra Acharjya Choudhry* v. *Radhika Mohan Roy* (1907), 35 Calc. 276; 12 C. W. N. 237.

[5] In *Rajah of Kalahasti* v. *Achigadu* (1905), 30 Mad. 454, and *Ram Das Marwari* v. *Braja Behari Singh (Tekait)* (1902), 6 C. W. N. 879, the son was held to be bound by the debt. A different view was adopted in *Nachiappa Chattiar* v. *Chinnayasami Naicker* (1906), 29 Mad. 499, and *Kali Krishna Sarkar* v. *Raghunath Deb* (1903), 31 Calc. 224.

[6] *Ante*, pp. 263, 264.

[7] *Shyam Lal Singh* v. *Bijay N. Kunda Bahadur (Raja)* (1917), 2 Pat. L. J. 136. *Ante*, p. 323.

CHAPTER IX.

PARTITION.

PARTITION is the process by which the members of a joint family become separate, and cease to be coparceners.[1] What is partition.

Under the Mitakshara school separation may be effected either by a partition of the title, *i.e.* by an ascertainment of the shares of the coparceners, and by a separation of such shares in interest, the coparceners thereafter holding as tenants in common, or by a partition of the property by metes and bounds.

According to the Dayabhaga school it consists of a division of the property by metes and bounds between the coparceners in accordance with their shares.

WHO IS ENTITLED TO PARTITION.

Who is entitled to partition.

"The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition."[2]

As to the rights of tenure holders, see *Bhagwat Sahai* v. *Bepin Behari Mitter* (1910), 37 I. A. 198; 37 Calc. 918; 14 C. W. N. 962; 12 Bom. L. R. 997; *Salimullah* v. *Probhat Chandra Sen* (1916), 43 Calc. 118; *Ram Lochi Koeri* v. *Collingridge* (1907), 11 C. W. N. 397.

Agreement not to partition.

Except in Bombay[3] an agreement for consideration[4] not to partition coparcenary property binds the actual parties thereto,[5] but it does not bind their representatives, or, unless there be an agreement not to assign, their assignees.[6]

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[1] Cunningham's "Hindu Law," p. 136. As to the mode by which such separation is effected, see *post*, pp. 343 *et seq.*

[2] *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71, at p. 75; 16 Calc. 397, at p. 405. See *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 7 M. I. A. 476, at p. 537; 4 W. R. P. C. 42, at p. 45. This applies equally to widows, *Sellam* v. *Chinnammal* (1901), 24 Mad. 441.

[3] *Ramlinga Khanapure* v. *Virupakshi Khanapure* (1883), 7 Bom. 538.

[4] *Srimohan Thakur* v. *Macgregor* (1901), 28 Calc. 769, at p. 786; *Radhanath Mookerjee* v. *Tarrucknath Mookerjee* (1875), 3 C. W. N. 126.

[5] *Ramdhone Ghose* v. *Anund Chunder Ghose* (1865), 2 Hyde, 93; *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106; *Krishnendra Nath Sarkar* v. *Debendra Nath Sarkar* (1908), 12 C. W. N. 793, explaining *Srimohan Thakur* v. *Macgregor* (1901), 28 Calc. 769, at p. 786, and *Radhanath Mookerjee* v. *Tarrucknath Mookerjee* (1875), 3 C. W. N. 126. See *Subbaraya Tawker* v. *Rajaram Tawker* (1901), 25 Mad. 585.

[6] *Anath Nath Dey* v. *Mackintosh* (1871), 8 B. L. R. 60; *Anand Chandra Ghose* v. *Pran Kisto Dutt* (1869), 3 B. L. R. O. C. 14; 11 W. R. O. C. 19; *Pirojshah* v. *Manibhai* (1911), 36 Bom. 53; 13 Bom. L. R. 963.

Condition in will.

A direction in a will prohibiting partition has no effect, as it is a condition repugnant to the gift.[1] Similarly, the owner of property cannot by mere contract during his life prevent his heirs from partitioning property after his death.[2]

By custom or by the terms of a grant from Government property may be impartible.[3]

Except in the case of a suit by a minor,[4] the Court has no discretion to refuse partition.[5] Each coparcener is at liberty to elect to separate from the joint family, but he cannot force a separation among the others against their will.[6]

Bengal school.

Under the Bengal school of law, every adult coparcener, male or female,[7] is entitled to enforce partition of the coparcenary property.

Mitakshara school.

Except that there can be no partition directly between grandfather and grandson while the father is alive,[8] or between great-grandfather and great-grandson when the father or grandfather is alive, every adult coparcener is, under the Mitakshara school of law, entitled to enforce partition.

"According to the Mitakshara law, all the male descendants of the common ancestor have an interest in the property, and any of them may demand partition, unless excluded by some disability. The descendants of the common ancestor may live together for generations; and when partition is to take place, all that is necessary is to ascertain their mutual relationship.[9]

"The property in the paternal or ancestral estate acquired by birth

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[1] *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (1875), 1 Calc. 104; *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37; 15 Calc. 409; Act X. of 1865 (Succession), s. 125, applied to certain Hindu wills under the Hindu Wills Act (XXI. of 1870) by s. 2 of the latter Act.

[2] *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106.

[3] See *Vinayak* v. *Gopal* (1903), 30 I. A. 77; 27 Bom. 353; 7 C. W. N. 409; 5 Bom. L. R. 408.

[4] *Post*, pp. 328, 329.

[5] *Sellam* v. *Chinnammal* (1901), 24 Mad. 441, at p. 443; *Lade* v. *Sadashiva* (1904), 6 Bom. L. R. 35.

[6] *Manjanatha* v. *Narayana* (1882), 5 Mad. 362, at p. 367. As to the presumption of a general partition, see *ante*, p. 222.

[7] *Durga Nath Pramanick* v. *Chintamani Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11. As to the case of a childless widow, who is entitled to a very small share, see *post*, p. 328, note 7.

[8] *Bishen Chand* (*Rai*) v. *Asmaida Koer* (*Mussumat*) (1884), 11 I. A. 164, at p. 179; 6 All. 560, at p. 574; "Mitakshara," chap. i. sec. 5, para. 3. A different view was adopted in *Jogul Kishore* v. *Shib Sahai* (1883), 5 All. 430; see *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1891), 16 Bom. 29. Although the grandson may be unable to enforce partition he is a coparcener. Apparently if his interest be sold (see *ante*, p. 300), the purchaser could not enforce partition (see *post*, p. 331), and might have to run the risk of waiting until the death of the father before suing for partition.

[9] Bhattacharya's "Hindu Law," 2nd ed. p. 322.

under the Mitakshara law is . . . so connected with the right to a partition that it does not exist where there is no right to it."[1]

Right of son, grandson, and great-grandson.

Under the Mitakshara law,[2] a son[3] is entitled to partition of the coparcenary estate, whether movable or immovable,[4] as against his father.[5] On his father's death, but not until then, he is entitled to partition as against his father's father.[6] On the death of his father and his father's father he has a similar right against his father's father's father.[7]

On the death of his father he represents his father's right to claim partition against his father's father.[8]

Even when his father and grandfather are both alive, a suit for partition may be brought by a coparcener, if they allow the property to be wasted and his interest to be imperilled.[9]

Partition between women.

Where two or more women hold property jointly as in the cases of widows or daughters succeeding as heirs, although one of them may not be absolutely entitled to enforce a partition, she is entitled to partition if they cannot hold the property peaceably,[10] but such partition does not affect the right of

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[1] *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51, at p. 64; 10 All. 272, at p. 287.

[2] This question cannot arise under the Bengal school, *ante*, pp. 223, 224.

[3] As to illegitimate sons, see *ante*, pp. 227, 228.

[4] *Jugmohandas Mangaldas* v. *Mangaldas Nathubhoy (Sir)* (1886), 10 Bom. 528.

[5] *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1879), 6 I. A. 88, at p. 100; 5 Calc. 148, at p. 165; 4 C. L. R. 226, at p. 233; *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1891), 16 Bom. 29, at pp. 32, 33; *Raja Ram Tewary* v. *Luchmun Persad* (1867), B. L. R. F. B. 731, at p. 738; 8 W. R. C. R. 15, at p. 20; *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 336; *Subba Ayyar* v. *Ganasa Ayyar* (1895), 18 Mad. 179; *Kaliparshad* v. *Ramcharan* (1876), 1 All. 159; *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy* (1887), 12 Bom. 280 (a case of Khoja Mahomedans). It was held by a majority of the full bench in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1891), 16 Bom. 29, that although a son can sue his father alone, a son cannot in the lifetime of his father sue his father and uncles for partition (see also *Jivabhai* v. *Vadilal* (1905), 7 Bom. L. R. 232), but the Madras High Court has dissented from this view, *Subba Ayyar* v. *Ganasa Ayyar* (1895), 18 Mad. 179, see also Bhattacharya's "Hindu Law," 2nd ed., pp. 324, 325. It is submitted that the view of the dissenting Judge (Telang, J.) in the Bombay case was correct.

[6] *Nagalinga Mudali* v. *Subbiramanaya Mudali* (1862), 1 Mad. H. C. 77.

[7] This follows from the fact that the great-grandson acquires a right by birth, *ante*, p. 225.

[8] "Mitakshara," chap. i. sec. 5, para. 1.

[9] *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1903), 31 Calc. 111; 7 C. W. N. 688.

[10] *Nilamani Patta Maha Devi Garu (Sri Gajapathi)* v. *Radhamani Patta Maha Devi Garu (Sri Gajapathi)* (1877), 4 I. A. 212, at p. 221; 1 Mad. 290, at p. 300; 1 C. L. R. 97, at pp. 104, 105; *Chhittar Kunwar* v. *Gaura Kunwar* (1911), 34 All. 189; *Sundar (Mussamat)* v. *Parbati (Mussammat)* (1889), 16 I. A. 186; 12 All. 51, and cases

survivorship of the co-widow or sister,[1] and must be effected in such a way as not to prejudice the reversionary heirs.[2]

This case frequently occurs under the Bengal school of law. Under the Mitakshara school it could only occur with regard to the separate acquisitions of the husband or father,[3] or in the case where the husband or father died without leaving any coparcener surviving him, or perhaps in a case where a share is allotted to wives on a partition.[4]

Where a widow or daughter is entitled to a partition a purchaser of her share is also entitled to partition.[5]

Where a Hindu widow is entitled to partition, and there is a reasonable apprehension that she will waste the movable property allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners.[6]

It has been held that in a suit for partition by a widow the Court has a discretion.[7]

Minor coparcener. Where a coparcener is a minor, and his interests are likely to be prejudiced by the property remaining joint, as, for instance, where his coparceners are wasting the property, or setting up rights adverse to him, or decline to provide for his maintenance, or it be otherwise for his interest that there should be a partition, a suit [8] for a partition can be brought on his behalf,[9] even against

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below, note 1. *Ariyaputri* v. *Alamelu* (1888), 11 Mad. 304; *Durga Dat* v. *Gita* (1911), 33 All. 443; *contrà* *Kathaperumal* v. *Venkabai* (1880), 2 Mad. 194; *Sellam* v. *Chinnammal* (1901), 24 Mad. 441; *Jijoyiamba Bayi Sahiba* (H. H. M.) v. *Kamakshi Bayi Sahiba* (H. H. M.) (1868), 3 Mad. H. C. 424.

[1] *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Radhamani Patta Maha Devi Garu* (*Sri Gajapathi*) (1877), 4 I. A. 212; 1 Mad. 290; 1 C. L. R. 97; *Dal Koer* (*Musst.*) v. *Panbas Koer* (*Musst.*) (1904), 8 C. W. N. 658; *Rindnamma* v. *Venkataramappa* (1866), 3 Mad. H. C. 268; *Padmamani Dasi* (*Srimati*) v. *Jagadamba Dasi* (*Srimati*) (1871), 6 B. L. R. 134; *Hari Narayan Jog* v. *Vitai* (1907), 31 Bom. 560; 9 Bom. L. R. 1049.

[2] *Dal Koer* (*Musst.*) v. *Panbas Koer* (*Musst.*) (1904), 8 C. W. N. 658; *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215.

[3] *Jhunna Kuar* v. *Chain Sukh* (1881), 3 All. 400.

[4] *Post*, pp. 331, 332.

[5] *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215.

[6] *Durga Nath Pramanik* v. *Chintamoni Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11. See *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215.

[7] *Mohadeay Kooer* v. *Haruknarain* (1882), 9 Calc. 244, at p. 250. See also cases, above, note 1. It was said in *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (1877), 2 Calc. 262, at p. 271, that the Court would probably refuse partition by metes and bounds to a childless widow who was entitled to a very small share.

[8] *I.e.* either a suit in a Civil Court, or a proceeding in a Revenue Court.

[9] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 402; *Mahadev Balvant* v. *Lakshman Balvant* (1894), 19 Bom. 99; *Thangam Pillai* v. *Suppa Pillai* (1888), 12 Mad. 401; *Kamakshi Ammal* v. *Chidambara Reddi* (1866). 3 Mad. H. C. 94; *Alimelammal* v.

his father.[1] If there be no such special circumstances, such suit cannot be instituted on his behalf.[2]

The same principle would apply to reviving on behalf of a minor a suit for partition instituted by his father,[3] provided it be clear that the omission to continue the suit does not prejudice the minor's rights to the property.

It is not ordinarily in the interests of a minor member of a joint Hindu family, or of any other minor joint-owner, that his share should be separated. *Primâ facie*, a partition is not for a minor's benefit, because, ordinarily speaking, the family estate is better managed, and yields a greater ratio of profit in union than when split up and distributed among the several parceners, and moreover, by partition, a minor member of a Mitakshara family would lose the benefit of survivorship.[4] There is also the danger of the minor's property being wasted by the costs of litigation.

Such special circumstances, as would render a suit for partition necessary in the interest of the minor, would justify a guardian in arranging a partition,[5] or submitting it to arbitration.[6]

Where an adult co-sharer insists upon partition the guardian cannot resist it, but must do his best in the interests of the minor.[7]

A partition by arbitration,[8] or by arrangement,[9] or by the Collector,[10] is binding on a minor, and can be enforced by him,[11] provided that he be not injuriously affected thereby, that it

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Arunachellam Pillai (1866), 3 Mad. H. C. 69; *Lekhraj Kooer* (*Mussamut*) v. *Dyal Singh* (*Sirdar*) (1876), 25 W. R. C. R. 497.

[1] *Bholanath* v. *Ghasi Ram* (1907), 29 All. 373.

[2] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 401; *Alimelammal* v. *Arunachellam Pillai* (1866), 3 Mad. H. C. 69; *Svamiyar Pillai* v. *Chokkalingam Pillai* (1862), 1 Mad. H. C. 105. If the suit be not for the benefit of the minor, the Court will refuse to decree partition: *Bachoo Hurkissondas* v. *Mankorebai* (1907), 34 I. A. 107; 31 Bom. 373; 11 C. W. N. 769; 9 Bom. L. R. 646.

[3] *Parvathi* v. *Manjayakarantha* (1870), 5 Mad. H. C. 193.

[4] *Kamakshi Ammal* v. *Chidambara Reddi* (1861), 3 Mad. H. C. Rep. 94; Macnaghten's "Hindu Law," vol. ii. chap. i. s. 1, case 10; Mayne's "Hindu Law," 8th ed., pp. 661, 662.

[5] *Ante*, p. 328. See *Parbati* (*Mussammat*) v. *Naunihal Singh* (*Chaudhri*) (1909), 36 I. A. 71; 31 All. 412; 13 C. W. N. 983; 11 Bom. L. R. 878. West and Bühler, 2nd ed., p. 303.

[6] *Jagan Nath* v. *Mannu Lal* (1894), 16 All. 231.

[7] See *Nallappa Reddi* v. *Balammal* (1864), 2 Mad. H. C. 182.

[8] *Ramnarain Poramanick* v. *Sreemutty Dossee* (1864), 1 W. R. C. R. 281.

[9] *Deo Bunsee Kooer* (*Mussamut*) v. *Dwarkanath* (1868), 10 W. R. C. R. 273; S. C. *Deowanti* v. *Dwarkanath*, 8 B. L. R. 363, note; *Daya Shankar* v. *Hub Lal* (1914), 37 All. 105.

[10] *Hari Prasad Jha* (*Baboo*) v. *Muddan Mohan Thakur* (1872), 8 B. L. R., Ap. 72; 17 W. R. C. R. 217.

[11] *Awadh Sarju Prasad Singh* v. *Sita Ram Singh* (1906), 29 All. 37.

be fair, that he be duly represented,[1] and that the person representing him in such proceedings act *bonâ fide* and with a due regard to his interest.[2]

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition, and if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself." [3]

Effect of birth of son after partition.

When a son is born to the father of a Mitakshara family, after there has been a partition between him and his sons, the afterborn son is not entitled to a redistribution,[4] unless he was conceived at the time of the partition,[5] but he is to the exclusion of his separated brethren entitled as a coparcener to the share allotted to his father, and to succeed as heir to his father.[6]

It has been held that where the father has reserved no share for himself on the partition, an afterborn son is entitled to a share.[7]

In a case governed by the Bengal school, a posthumous son would be entitled to reopen a partition made by his brothers after his father's death and before his birth.[8]

Absent coparceners.

As to the effect of a partition on the rights of coparceners

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[1] *Lal Bahadur Singh* v. *Sispal Singh* (1892), 14 All. 498; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197; *Daya Shankar* v. *Hub Lal* (1914), 37 All. 105.

[2] *Kalee Sunkur Sannyal* v. *Denendro Nath Sannyal* (1874), 23 W. R. C. R. 68; *Chanvirapa* v. *Danava* (1894), 19 Bom. 593; *Nallapa Reddi* v. *Balammal* (1864), 2 Mad. H. C. 182. As to cases governed by Malabar law, see *Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kuti* (1905), 29 Mad. 62.

[3] *Balkishen Das* v. *Ram Narain Sahu* (1903), 30 I. A. 139, at p. 150; 30 Calc. 738, at p. 752; 7 C. W. N. 578, at p. 580; 5 Bom. L. R. 461. As to the limitation for such suits, see *Lal Bahadur Singh* v. *Sispal Singh* (1892), 14 All. 498; *Krishnabai* v. *Khangowda* (1893), 18 Bom. 197; *Chanvirapa* v. *Danava* (1894), 19 Bom. 593.

[4] *Yekeyamian* v. *Agniswarian* (1869), 4 Mad. H. C. 307; *Shivajirao* v. *Vasantrao* (1908), 33 Bom. 267; 10 Bom. L. R. 778; *Gunpat* v. *Gopalrao* (1898), 1 Bom. L. R. 123.

[5] *Minakshi* v. *Virappa* (1884), 8 Mad. 89.

[6] See *Nawal Singh* v. *Bhagwan Singh* (1882), 4 All. 427; *Gunpat* v. *Gopalrao* (1898), 1 Bom. L. R. 123. Where one son has separated, the afterborn son is entitled to share with the father and the united sons, but has no right to a share of the property allotted to the separated son, *Gunpat Venkatesh Despande* v. *Gopalrao Venkatesh Despande* (1899), 23 Bom. 636.

[7] See *Chengama Nayudu* v. *Munisami Nayudu* (1896), 20 Mad. 75; W. Macnaghten's "Hindu Law," vol. i. p. 47.

[8] "Dayabhaga," chap. vii. para. 10.

who are absent, Sir Thomas Strange [1] says as follows: "Upon the same footing, in this respect, with minors are *absentees*, residing in a foreign country,[2] whose consent, at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrive at majority, and the other returns; and this is the case of the latter to the extent of the *seventh* in descent, the right of parceners remaining at home, being lost by dispossession beyond the *fourth*." [3]

This would, of course, be subject to the law for the limitation of suits.[4]

The purchaser of the share of a coparcener, either at an execution sale [5] or by a voluntary transfer, where such transfer is valid,[6] has the same right of partition as the coparcener whose share was purchased by him, and is entitled to have a separate portion allotted to him,[7] but he may be compelled to sell to a coparcener a share of a dwelling-house purchased by him.[8] Purchaser of share.

As to a suit by a transferee for partition, see *post*, p. 354.

Rights of Wife and Widow.

Under the Mitakshara school of law, except in Southern India, on a partition of coparcenary property by a father and his son or sons (or purchasers of their shares [9]), the wife of the Rights of wife on partition.

[1] "Hindu Law," vol. i. pp. 206, 207.

[2] The rules as to what is a foreign country (Colebrooke's "Digest," vol. ii. p. 29), such as difference of language, the intervention of a mountain or great river, countries being accounted distant whence intelligence is not received in ten nights, would probably be disregarded in view of modern means of communication.

[3] "Dayabhaga," chap. viii.; Colebrooke's "Digest," vol. iii. pp. 440, 448; "Daya-Krama Sangraha," chap. ix.; Strange's "Hindu Law," vol. ii. pp. 327, 390.

[4] See Act IX. of 1908, Sched. I., Arts. 127, 144.

[5] *Ante*, p. 300.

[6] *Ante*, pp. 301, 302.

[7] *Bepin Behari Moduck* v. *Lall Mohun Chattopadhya* (1885), 12 Calc. 209; *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 215 (a suit by a purchaser from one of two widows); *Alamelu* v. *Rangasami* (1884), 7 Mad. 588; *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Lall Jha* (*Baboo*) v. *Juma Buksh* (*Shaikh*) (1874), 22 W. R. C. R. 116; *Lochun Singh* v. *Nemdharee Singh* (1873), 20 W. R. C. R. 170; *Rughoonath Panjah* v. *Luckhun Chunder Dullal Chowdhry* (1872), 18 W. R. C. R. 23; *Anand Chandra Ghose* v. *Prankisto Dutt* (1869), 3 B. L. R. O. C. 14. As to his share on partition, see *ante*, pp. 301, 302.

[8] Act IV. of 1893, s. 4, *post*, p. 357.

[9] *Sumrun Thakoor* v. *Chundermun Misser* (1881), 8 Calc. 17; 9 C. L. R. 415.

father is entitled to have allotted to her for her separate enjoyment a share equal to a son's share,[1] in order to provide for her maintenance.[2]

Mr. Mayne[3] stated that in Southern India the practice of allotting shares to wives is obsolete. Having regard to old authorities of the Dravida school it was not settled whether the father retained for them the shares which are assigned to his wives, or whether, as in the case of the Benares, Bombay, and Mithila schools, the shares should be made over to the wives themselves.[4]

Bengal school. As under the law of the Bengal school a father is entitled to the absolute disposal of his property, whether ancestral or self-acquired,[5] this question cannot arise. In the rare case of a father partitioning his property amongst his sons, it is said that "his sonless wives are each entitled to a share equal to that of a son, or to half[6] of such share, according as they are unprovided, or provided, with *stridhana*."[7]

If the wife has previously had separate property given to her by her husband or father-in-law, she takes so much as with such separate property would amount to a share equal to that of one of the sons.[8]

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[1] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 401; *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234; 9 C. W. N. 270; *Sumrun Thakoor* v. *Chundermun Misser* (1881), 8 Calc. 17; 9 C. L. R. 415; *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 99; 20 W. R. C. R. 192, at p. 196; *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 337; *Pursid Narain Sing* v. *Hunooman Sahay* (1880), 5 Calc. 845, at p. 854; 5 C. L. R. 576, at p. 585. In each of the above cases the partition was at the instance of a son, but it is submitted that the same principle would apply when the partition was at the instance of the father, see "Mitakshara," chap. i. s. 7, paras. 1, 2. See "Vyavahara Mayukha," chap. iv., paras. 4, 5, 11; "Smriti Chandrika," chap. ii. s. 1, para. 39; "Vivada Chintamani" (P. C. Tagore's translation), pp. 230, 231; Colebrooke's "Digest," vol. iii. p. 12. This includes a stepmother of the sons. Macnaghten's "Hindu Law," vol. i. p. 50.

[2] *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 363, at p. 383; 20 W. R. C. R. 337, at p. 340; *Jairam Nathu* v. *Nathu Shamji* (1906), 31 Bom. 54; 8 Bom. L. R. 632. Strange's "Hindu Law," vol. i. p. 189. Banerjee's "Law of Marriage," 2nd ed., p. 141. See, however, *Dular Koeri* v. *Dwarkanath Misser* (1904), 32 Calc. 234, at p. 242; 9 C. W. N. 270, at p. 276.

[3] Mayne's "Hindu Law," 8th ed., p. 664; *Meenatchee* v. *Chedumbra Chetty*, Mad. dec. of 1853, 61.

[4] See "Smriti Chandrika," chap. ii. s. 1, 39; "Parasara Madhavya-Dayavibhaga" (Burnell's translation), p. 8; Strange's "Hindu Law," vol. i. p. 189.

[5] *Ante*, p. 224.

[6] See, however, Colebrooke's "Digest," vol. iii. pp. 20–25.

[7] Banerjee's "Law of Marriage," 2nd ed., pp. 140, 141, 142; "Dayabhaga," chap. iii. s. 2, paras. 31, 32; "Daya-Krama Sangraha," chap. vi. paras. 22–28; "Dayatattwa," chap. ii. paras. 13–18.

[8] "Mitakshara," chap. ii. s. 11, para. 5. *Jairam Nathu* v. *Nathu Shamji* (1906), 31 Bom. 54; 8 Bom.

Mother's share on partition.

Except in Southern India, where, it is said, the practice is obsolete,[1] a widow is, on a partition of coparcenary property [2] (but not on a mere severance of interest [3]) between her sons (or purchasers of their shares),[4] entitled to a share equal to that of one of her sons in lieu of maintenance.[5]

The Calcutta High Court allows her a son's share on a partition between her sons and grandsons,[6] but the Allahabad High Court denies such right.[7]

In Madras a mother is, according to the "Smriti Chandrika," entitled on partition between her sons to have allotted to her a portion sufficient for her maintenance, but not exceeding the share of one of her sons.[8]

Except under the Bengal school,[9] a sonless widow is entitled

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L. R. 632. See *Mahabeer Persad* v. *Ramyad Singh* (1873), 12 B. L. R. 90, at p. 99; 20 W. R. C. R. 192, at p. 196.

[1] Mayne's "Hindu Law," 8th ed., pp. 664, 665, 866.

[2] She is not entitled to such right in property which has been acquired by the sons without any aid from the estate of their ancestors.

[3] *Beti Kunwar* v. *Janki Kunwar* (1910), 33 All. 118.

[4] *Amrita Lall Mitter* v. *Manick Lall Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764; *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; 4 C. W. N. 254.

[5] *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussummat*) (1903), 31 I. A. 10, at p. 15; 31 Calc. 262, at p. 271; 8 C. W. N. 146, at p. 150; 6 Bom. L. R. 1; *Hemangini Dasi* (*Srimati*) v. *Kedarnath Kudu Chowdhry* (1889), 16 I. A. 115; 16 Calc. 758; *Torit Bhoosun Bonnerjee* v. *Taraprosonno Bonnerjee* (1879), 4 Calc. 756; *Pursid Narain Sing* v. *Hunooman Sahay* (1880), 5 Calc. 845; 5 C. L. R. 576; *Kishori Mohun Ghose* v. *Monimohun Ghose* (1885), 12 Calc. 165; *Isree Pershad Singh* v. *Nasib Kooer* (1884), 10 Calc. 1017; *Bilaso* v. *Dina Nath* (1880), 3 All. 88; *Jodoonath Dey Sircar* v. *Brojonath Dey* (1874), 12 B. L. R. 385; *Jugomohan Haldar* v. *Sarodamoyee Dossee* (1877), 3 Calc. 149; *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271; *Lakshman Ramchandra Joshi* v. *Satayabhamabai* (1877), 2 Bom. 494, at p. 504; *Beeby* v. *Kshitish Chandra Acharya Chaudhuri* (1914), 18 C. W. N. 631; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61. In *Thukoo Baee Bhide* v. *Ruma Baee Bhide* (1824), 2 Borr. 446, at p. 454, the pundits declared that the mother had a right to a share, although there was only one son. See also cases in West and Bühler, 2nd ed., pp. 391, 392.

[6] *Badri Roy* v. *Bhugwat Narain Dobey* (1882), 8 Calc. 649; 11 C. L. R. 186; *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065; 8 C. W. N. 763; *Sibbosoondery Dabia* v. *Bussoomutty Dabia* (1881), 7 Calc. 191; *Prawnkissen Mitter* v. *Muttysondery* (1841), Fulton, 389.

[7] *Radha Kishen Man* v. *Bachhaman* (1880), 3 All. 118; *Sheo Narain* v. *Janki Prasad* (1912), 34 All. 505.

[8] Chap. iv. paras. 12–17. This is in accordance with the practice in Madras: Mayne's "Hindu Law," 8th ed., p. 665. *Mari v. Chinnammal* (1884), 8 Mad. 107, at p. 123; *Venkatammal* v. *Andyappa Chetti* (1882), 6 Mad. 130; Strange's "Hindu Law," vol. ii. p. 309. See Macnaghten's "Hindu Law," vol. i. p. 50.

[9] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537, at p. 542; 10 C. L. R. 401, at p. 405.

to a share on a partition between her stepsons.[1] A step-grandmother is similarly entitled in case of a partition between the sons of her stepson.[2] Under the Bengal school when a partition is made between sons of different mothers, each mother is entitled to a share equal to that of each of her sons.[3]

In a partition between sons by different wives the respective mothers are only entitled to share equally with their own sons the aggregate of the shares which an equal division among the brothers allots to those sons, or, in other words, the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her sons.[4]

In a Bombay case [5] where there was a partition between a son and his stepmother and her three sons, the stepmother was given one-fifth. According to the above rule, she would have been entitled to a three-sixteenth share.

This right of the mother has been held only to apply to the case of a general partition, and not to a case where there has been only a partition of an item of the property at the instance of a stranger.[6]

It has also been held that this right only comes into operation when the partition is completed.[7]

Under the Bengal law a husband can by will, either expressly[8] or by a bequest to other persons,[9] deprive his wife of a share on partition.

A mere direction to divide the estate among the sons in accordance with the *shastras* does not exclude the widow's right to a share.[10]

Right of grandmother.

On a partition between her son's sons, a widow is entitled to a share equal to that of a son's son.[11]

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[1] *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537; 10 C. L. R. 401 (a Mithila case); *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373; 20 W. R. C. R. 337; *Thakur Proshad (Chowdhry)* v. *Bhagbati*, 1 C. L. J. 142; *Har Narain* v. *Bishambhar Nath* (1915), 38 All. 83.

[2] *Vithal* v. *Prahlad* (1915), 39 Bom. 373; 17 Bom. L. R. 361.

[3] *Hemangini Dasi (Srimati)* v. *Kedar Nath Kudu Chowdhry* (1889), 10 I. A. 115; 16 Calc. 758. See *Torit Bhoosun Bonnerjee* v. *Taraprosono Bonnerjee* (1879), 4 Calc. 756.

[4] *Kristobhabiney Dossee* v. *Ashutosh Bosu Mullick* (1886), 13 Calc. 39; *Cally Churn Mullick* v. *Janova Dossee* (1866), 1 Ind. Jur. 284.

[5] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271.

[6] *Barahi Debi* v. *Debkamini Debi* (1892), 20 Calc. 682.

[7] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. 61; explained in *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96.

[8] *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886, following *Bhoobunmoyee Debea Chowdhrain* v. *Ramkissore Acharj Chowdhry*, Ben. S. D. A. 1860, p. 485.

[9] *Poorendra Nath Sen* v. *Hemangini Dasi* (1908), 36 Calc. 75; 12 C. W. N. 1002. As to her right of maintenance in such case, see *ante*, pp. 78, 79.

[10] *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (1885), 12 Calc. 165.

[11] *Sorolah Dossee* v. *Bhoobun Mohun*

On a partition between son's sons and great-grandsons, she is entitled to the share of a son's son.[1]

When the partition is between grandsons by different sons, the share of the grandmother is to be ascertained by giving her such a share as she would take if each of the grandsons took equally. Thus if there be nine grandsons she will get one-tenth, and so on. The share which the grandsons themselves take depends upon the number in each stock, and upon whether their own mothers are alive.

Great-grandmother.

The right of a widow to a share on a partition between her great-grandsons is not expressly recognized by the Hindu law.[2] The right would, it is submitted, be admissible upon grounds similar to those which confer a right upon a mother and grandmother.[3]

Gift by husband.

In fixing the amount of her share, the widow must be debited with the value of any gift or legacy which she may have received from her husband.[4]

Apparently, as in the case of allotting maintenance, her separate property must be taken into account,[5] but the fact that she has inherited a share from one of her sons does not deprive her of her right to a share on partition.[6]

In the absence of an express arrangement, a wife or widow has only a restricted interest in the property allotted to her on such partition, whether she be governed by the Bengal[7]

Neoghy (1888), 15 Calc. 292, at p. 306; *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61; "Dayabhaga," chap. iii. s. 2, para. 32; "Daya-Krama-Sangraha," chap. vii. paras. 4, 6; "Dayatattwa," chap. ii. para. 19; F. Macnaghten, 39, 41, 52, 54; Sircar's "Vyavastha Darpana," 2nd ed. pp. 493–498. *Contrà Puddum Mookhee Dossee* v. *Rayee Monee Dossee* (1869), 12 W. R. C. R. 409; S. C. on review, *Rayee Monee Dossee* v. *Puddum Mookhee Dossee* (1870), 13 W. R. C. R. 66, which was a case on the same footing as a partition between sons. See *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065, at p. 1076; 8 C. W. N. 763, at p. 771.

[1] *Purna Chandra Chakravarti* v. *Sarojini Debi* (1904), 31 Calc. 1065; 8 C. W. N. 763. F. Macnaghten, 52.

[2] Colebrooke's "Digest," vol. iii. p. 27. F. Macnaghten, pp. 28, 51; doubted by Wilson, Works, v. 25.

[3] See Sircar's "Vyavastha Darpana," 2nd ed., pp. 497, 498.

[4] *Kishori Mohun Ghose* v. *Monimohun Ghose* (1885), 12 Calc. 165; *Judoonath Dey Sircar* v. *Brojonath Dey Sircar* (1874), 12 B. L. R. 385. "Mitakshara," chap. i. s. 2, para. 9; "Vyavahara Mayukha," chap. iv. s. 4, para. 18.

[5] *Ante*, p. 86. See "Vyavahara Mayukha," chap. iv. s. 4, para. 18.

[6] *Jugomohan Haldar* v. *Sarodamoyee Dassee* (1877), 3 Calc. 149; *Poorendra Nath Sen* v. *Hemangini Dasi* (1908), 36 Calc. 75; 12 C. W. N. 1002.

[7] *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292; *Hridoy Kant Bhattacharjee* v. *Behari Lal Mookerjee* (1906), 11 C. W. N. 239; *Tripura Sundari Debi* v. *Dakshina Mohun Roy* (1906), 11 C. W. N. 698.

or by the Mitakshara school.[1] It does not pass to her *stridhan* heirs,[2] and she cannot dispose of it by will.[3]

On her death it goes back, it is submitted, to the sons and grandsons from whose share it was deducted.[4] This question was not decided in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*.[5] It depends upon whether the property is given to the woman in lieu of inheritance or in lieu of maintenance.[6] It is submitted that it is given to her in lieu of maintenance.[7] It was suggested in *Dinesh Chandra Roy Chowdhury* v. *Biraj Kaminey Dasee* (1911), 39 Calc. 87, at p. 100; 15 C. W. N. 945, at p. 952, that the right arises from a proprietary right.

Effect of sale on right.

Although a right to maintenance is not a complete charge upon the property,[8] a right to a share in lieu of maintenance is not affected by a sale of an undivided share, whether before[9] or during the pendency of a partition suit.[10]

It has been held that the loss of a right of maintenance would involve the loss of the right to a share on partition.[11]

It is, it is submitted, clear that when the share had been allotted, want of chastity would not devest the right.[12]

Enforcement of right.

A wife or widow cannot, until there has been a partition or separation, enforce her right to a share,[13] even if by arrangement a share of the profits has been assigned to her for her maintenance,[14] or her name be recorded as a co-sharer,[15] and

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[1] *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1912), 39 I. A. 121; 34 All. 234; 16 C. W. N. 409; 14 Bom. L. R. 220, reversing *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (1909), 32 All. 253; *Chiddu* v. *Naubat* (1901), 24 All. 67; *Sri Pal Rai* v. *Surajbali* (1901), 24 All. 82.

[2] Cases *ante*, p. 335, note 7, and above, note 1.

[3] *Hridoy Kant Bhattacharjee* v. *Behari Lal Mookerjee* (1906), 11 C. W. N. 89.

[4] See cases *ante*, p. 335, note 7, and above, note 1.

[5] (1912), 39 I. A. 121; 34 All. 234; 16 C. W. N. 409; 14 Bom. L. R. 220. Their Lordships there said that it went back "to the estate from which it was taken."

[6] *Ibid.*

[7] See *Beeby* v. *Kshitish Chandra Acharya* (1914), 18 C. W. N. 631, and other cases *ante*, p. 333, note 5.

[8] *Ante*, p. 89.

[9] *Bilaso* v. *Dinanath* (1880), 3 All. 88; *Amrita Lal Mitter* v. *Manick Lal Mullick* (1900), 27 Calc. 551; 4 C. W. N. 764. See *Deendyal Lal* v. *Jugdeep Narain Singh* (1877), 4 I. A. 247, at p. 256; 3 Calc. 198, at p. 209.

[10] *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (1899), 27 Calc. 77; S. C. *sub nomine Jogendro Chunder Ghose* v. *Ganendra Nath Sircar*, 4 C. W. N. 254; *ante*, p. 93.

[11] *Sellam* v. *Chinnamal* (1901), 24 Mad. 441. See *ante*, p. 82.

[12] See *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115; 5 Calc. 776; 6 C. L. R. 322.

[13] *Sunder Bahu* v. *Monohur Lal Upadhya* (1881), 10 C. L. R. 79, at p. 80; *Beeby* v. *Kshitish Chandra Acharya* (1914), 18 C. W. N. 631; Strange's "Hindu Law," vol. i. pp. 188, 189; Colebrooke's "Digest," vol. iii. pp. 27, 422–427.

[14] *Bhoop Singh* v. *Phool Kower (Mussumat)* (1867), 2 Agra, 368.

[15] *Pema* v. *Jas Kunwar* (1913), 35 All. 527; *Kailashi Kunwar* v. *Badri Prasad* (1913), *Ibid.* 548.

until partition she has no alienable interest.[1] When there has been a partition, or a separation, she may sue for her share.[2] She is a necessary party to a suit by a son against her husband,[3] or to a suit between her sons, for partition; but the omission to reserve a share for the mother does not render the partition invalid.[4] She may acquiesce in such omission.[5]

A woman, who is not a coparcener, is not entitled to a share except on such partition as is above mentioned.[6] No other right on partition.

Although some of the ancient writers gave her the right to a one-fourth share,[7] a sister is not entitled to a share on a partition.[8] As she is entitled to her maintenance until marriage, and to her marriage expenses out of the family property,[9] provision therefor should be made at the time of the partition. Sister.

ALLOTMENT OF SHARES.

"To effect a partition in a case governed by the Dayabhaga it is necessary to know the dates of birth and death of predeceased members. But in a Mitakshara family the surviving members remain in possession of the whole property, as if the predeceased members never existed." [10]

On a partition shares are allotted in accordance with the following rules. Shares on partition.

There is nothing in law to prevent an arrangement upon a different footing,[11] so far as the interests of adult coparceners are concerned, but an arrangement between the parties to a partition that the shares should be inalienable, and should revert to the original coparceners, cannot be upheld.[12]

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[1] *Judoonath Tewaree* v. *Bishonath Tewaree* (1868), 9 W. R. C. R. 61.

[2] *Ram Joshi* v. *Laxmibai* (1864), 1 Bom. H. C. 189, and cases *ante*, p. 333, note 5.

[3] *Laljeet Singh* v. *Rajcoomar Singh* (1873), 12 B. L. R. 373, at p. 383; 20 W. R. C. R. 336, at p. 340.

[4] *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussumat*) (1903), 31 I. A. 10, at p. 15; 31 Calc. 262, at p. 271; 8 C. W. N. 146, at p. 150; 6 Bom. L. R. 1.

[5] *Ibid.*

[6] *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1868), 9 W. R. C. R. 61.

[7] "Manu," chap. ix. para. 118; "Mitakshara," chap. i. s. 7, paras. 5–10; "Dayabhaga," chap. iii. s. 2, paras. 38, 39; "Smriti Chandrika," chap. iv. paras. 32–34; "Vivada Chintamoni" (Tagore's translation), p. 248; Colebrooke's "Digest," vol. iii. pp. 93, 94.

[8] See *Damoodur Misser* v. *Senabutty Misrain* (1882), 8 Calc. 537, at p. 541; 10 C. L. R. 401, at p. 404; W. Macnaghten's "Hindu Law," vol. i. p. 50.

[9] *Ante*, pp. 52, 53, 235, 271.

[10] Bhattacharya's "Hindu Law," 2nd ed., p. 322.

[11] See *Ram Nirunjun Singh* v. *Prayag Singh* (1881), 8 Calc. 138; 10 C. L. R. 66; *Kanti Chandra Mukerji* v. *Ali-i-Nabi* (1911), 33 All. 414.

[12] *K. Venkatrammanna* v. *K. Brammanna Sastrulu* (1869), 4 Mad. H. C. 345. As to an agreement not to partition, see *ante*, p. 325.

Between father and sons.

Under the Mitakshara school of law, in a partition between a father and his sons, each of the sons takes a share equal to that of the father.[1]

Unequal division by father.

Although under the Mitakshara a father is entitled to dispose of his self-acquired property,[2] and under the Bengal school he is entitled to dispose of all his property, whether ancestral or self-acquired, it does not seem settled upon the authorities whether in the former case he can divide his self-acquired property, or in the latter case any of his property, in unequal shares between his sons.[3]

Some of the text writers [4] prohibited such inequality of division, except under special circumstances.

Mr. Mayne [5] summed up the authorities in the following words: "The result would be that a father under Mitakshara law, in dealing with his self-acquired property, or any other property in which his sons take no interest by birth, and a father under Bengal law, in dealing with any property, may distribute it as he likes. If he conforms to the rules of partition, the transaction will be valid by mutual agreement, without actual apportionment followed by possession; but if he does not conform to those rules, then he must deliver the share to each of the sharers, so as to make a valid gift to each."

As to the Bengal school, Dr. Jogendra Nath Bhattacharya,[6] said: "As the father can undoubtedly make a gift of ancestral property, even in favour of a stranger, there can be no doubt that the father can make an unequal partition of such property among his sons, though by doing so against the rules of the Shastras he incurs sin;" and R. C. Mitra [7] says: "It has been held that the injunctions against an unequal distribution by the father are mere moral precepts which no Court of law would enforce. A father bent upon making an unequal distribution may do so in more ways than one."

Father represents his sons.

As a general rule at a partition, each member of the family is presumed to represent not only himself but also his sons, and the sons take their share through their father, as being included in the share allotted them.[8]

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[1] "Mitakshara," chap. i. s. 5, para. 5. *Ante*, p. 226.

[2] *Ante*, pp. 248, 249.

[3] See *ante*, p. 224.

[4] Colebrooke's "Digest," vol. ii. pp. 540, 541; "Vyavahara Nirnaya," Burnell's translation, p. 8; "Daya-bhaga," chap. ii. paras. 15–20, 50, 86; Strange's "Hindu Law," vol. i. p. 194; Macnaghten's "Hindu Law," vol. ii. p. 147. "The Daya-bhaga" makes a distinction between ancestral and self-acquired property, so does the "Daya-Krama Sangraha" (chap. vi. paras. 8–16). The "Mitakshara" seems to allow an unequal partition, chap. i. s. 2, paras. 6, 13, 14. See also "Smriti Chandrika," chap. ii. s. i., paras. 17 to 24.

[5] 8th ed., p. 685.

[6] "Hindu Law," 2nd ed., p. 361.

[7] "Law of Joint Property and Partition," p. 320.

[8] *Umed* v. *Khalsabai* (1909), 11 Bom. L. R. 396.

It is open to the son to contest the partition on ground of fraud, or that the share allotted did not properly represent the share to which the father's heir was entitled.[1]

According to all the schools, on a partition brothers take equal shares.[2] **Between brothers, or their sons, etc.**

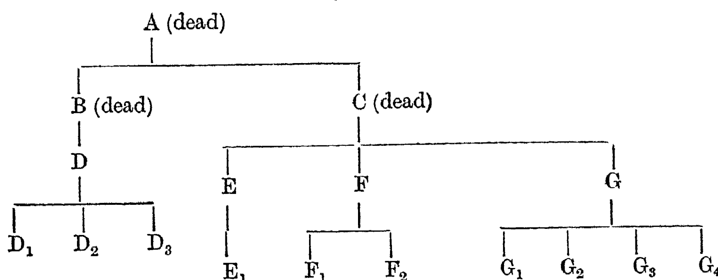
Under the Mitakshara school, the share of a brother who has died is represented by his sons, grandsons, and great-grandsons.[3] **Shares of deceased brothers.**

Under the Bengal school, the share of a brother, who is dead, is taken by his heir,[4] devisee, or assignee.

As between different branches of a family, division must be *per stirpes*, *i.e.* according to the stocks,[5] and as between the sons of the same father, it must be *per capita*,[6] *i.e.* according to the number of sons. **Different branches.**

This rule "is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principles that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares." [7]

Illustration. (*Mitakshara School.*)



[1] *Umed* v. *Khalsabai* (1909), 11 Bom. L. R. 396.

[2] *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561; *Bhyroochund Rai* v. *Russoomunee* (1799), 1 Ben. Sel. Rep. 28 (new edition, 36); *Neelkaunt Rai* v. *Munee Chowdraen* (1802), *ibid.* 58 (new edition, 77); *Taliwur Singh* v. *Puhlwan Singh* (1824), 3 Ben. Sel. Rep. 301 (new edition, 402); "Mitakshara," chap. i. s. 2, para. 6; chap. i. s. 3, paras. 1–7; "Smriti Chandrika," chap. ii. s. 2, para. 2; s. 3, paras. 16–24; "Vyavahara Mayukha," chap. iv. s. 4, paras. 8–11, 17; "Dayabhaga," chap. iii. s. 2, para. 27; "Daya-Krama Sangraha," chap. vii. para. 13; "Viramitrodaya," chap. ii. part i. ss. 11, 14. As to a usage to the contrary, see *Sheo Buksh* v. *Futteh Sing* (1818), 2 Ben. Sel. R. 265 (new edition, 340); Wm. Macnaghten's "Hindu Law," vol. ii. p. 16.

[3] *Bhimul Doss* v. *Choonee Lall* (1877), 2 Calc. 379; *Duljeet Sing* v. *Sheomunook Sing* (1802), 1. Ben. Sel. R. 59 (2nd ed., 79).

[4] *Ante*, pp. 223, 224.

[5] "Mitakshara," chap. i. s. 5, para. 2; *Rajnarain Singh* v. *Heeralal* (1878), 5 Calc. 142.

[6] "Mitakshara," chap. i. s. 3, paras. 1–7. See *Debi Parshad* v. *Thakur Dial* (1875), 1 All. 105, overruling *Madho Singh* v. *Bindessery Roy* (1868), 3 Agra H. C. 101.

[7] *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362, at p. 364.

The family having descended from two brothers, one half-share must be allotted to each branch. As to B's branch, D and his sons, D_1, D_2, and D_3, are each entitled to $\frac{1}{4}$ of $\frac{1}{2}$, *i.e.* $\frac{1}{8}$. As to C's branch, each of the sub-branches composed of C's sons, E, F, and G, with their sons respectively, will be entitled to $\frac{1}{3}$ of $\frac{1}{2}$, *i.e.* $\frac{1}{6}$, so E and E_1 will each get $\frac{1}{2}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{12}$, F, F_1, and F_2 will each get $\frac{1}{3}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{18}$, G, G_1, G_2, G_3, and G_4 will each get $\frac{1}{5}$ of $\frac{1}{6}$, *i.e.* $\frac{1}{30}$. This illustration will apply to the Bengal school except that under that school the sons do not take during the lifetime of their fathers.

Partial partition. This rule is laid down with reference to cases in which all the coparceners desire partition at the same time. Where there is a partition by some only of the coparceners, and subsequently there is a partition between the coparceners who had remained united after the first partition, it has been held [1] that the allotment of shares of the second partition must have regard to the state of the family before the first partition, with such variations as may have arisen in consequence of the death of coparceners or the birth of new coparceners; but according to a different, and, it is submitted, better view [2] the state of the family at the time of the second partition can alone be considered.

As to the Jhala Girasias of Limri in Kattiawar, see *Prithisingji* v. *Umedsingji* (1904), 6 Bom. L. R. 98.

As to the Chudasama Girasias of Kharad in the Dhanduka Taluka, see *Malubhai* v. *Sursangji* (1905), 7 Bom. L. R. 821.

Sons by different mothers. Except where there is a family usage to the contrary, sons by different mothers take equally.[3]

When daughters' sons,[4] or *gotraja sapindas* [5] other than descendants, succeed as heirs, they take on partition *per capita*.

As to the rights of purchasers, or mortgagees of shares, see *ante*, p. 331.

There is nothing to prevent adult coparceners making any arrangement as to the division, or as to the devolution of the shares,[6] provided that they do not thereby alter the inheritance,[7] or offend against the rule as to perpetuity.[8]

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[1] See *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362.

[2] *Pranjivandas* v. *Ichharam* (1915), 39 Bom. 734; 17 Bom. L. R. 712.

[3] See *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316, at p. 327; *Sumrun Singh* v. *Khadum Singh* (1814), 2 Ben. Sel. R. 116 (2nd ed., 147), Colebrooke's "Digest," vol. ii. p. 576.

[4] *Ramdhun Sein* v. *Kishen Kanth Sein* (1821), 3 Ben. Sel. R. 100 (2nd ed., 133).

[5] *Nagesh* v. *Gururao* (1892), 17 Bom. 303, at p. 305.

[6] See *Kanti Chandra Mukerji* v. *Ali-i-Nabi* (1911), 33 All. 414; *Ram Nirunjun Singh* v. *Prayag Singh* (1881), 8 Calc. 138; 10 C. L. R. 66; *Muthuraman Chattiar* v. *Ponnusamy Udayar* (1915), 29 Mad. L. J. 214.

[7] *Post*, p. 502.

[8] *Post*, p. 525.

SUBJECT OF PARTITION.

The coparcenary property,[1] movable or immovable, is alone the subject of partition. **Subject of partition.**

Property which has been proved to have, by ancient and invariable custom,[2] always descended to one individual, and to have been enjoyed by him alone, and not to have been divided,[3] is not coparcenary property,[4] and is therefore not partible. **Impartible property.**

As to proof of such impartibility, see *post*, p. 515.

A coparcener is entitled to insist that all the family property, which is capable of partition, shall be divided. **All property to be divided.**

Leasehold property, including property held on a lease from Government, can be partitioned.[5] **Leaseholds.**

Land in the possession of tenants can be partitioned,[6] either by metes and bounds, or by a division of the rent. **Land in occupation of tenants.**

A coparcener[7] or purchaser[8] is entitled to insist that the family dwelling-house be partitioned; but a purchaser may be required to sell his share therein to a coparcener.[9] **Family dwelling-house.**

He has a similar right with regard to a compound hitherto held in common, and such right is not affected by the fact that there is a public right of way over such compound.[10]

"The principle . . . of partition is that if a property can be partitioned without destroying the intrinsic value of the

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1 *Ante*, pp. 238–247.

2 See *ante*, pp. 27–29. *Koernarain Roy (Raja)* v. *Dhorindhur Roy*, Ben. S. D. A. 1858, p. 1132.

3 *Durriao Sing (Thakur)* v. *Davi Sing (Thakur)* (1873), 1 I. A. 1; 13 B. L. R. 165; *Ramalakshmi Ammal* v. *Sivananantha Perumal Sethurayer* (1872), I. A. Sup. Vol. 1; 12 B. L. R. 396; 14 M. I. A. 570; 17 W. R. C. R. 553; *Adrishappa* v. *Gurushidappa* (1880), 7 I. A. 162; 4 Bom. 494; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95. S. C. in Court below (1901), 24 Mad. 562. See *ante*, pp. 259–262.

4 *Ante*, pp. 263, 264.

5 *Dattatraya Vithal* v. *Mahadaji Parashram* (1891), 16 Bom. 528. As to the case where an occupancy holding is an item of coparcenary property, see *Dwarka* v. *Sheo Dulare* (1914), 36 All. 461.

6 See *Uppala Raghava Charlu* v. *Uppala Ramanuja Charlu* (1902), 26 Mad. 78. As to partition between a coparcener and the ijaradar of another coparcener, see *Ram Lochi Koeri* v. *Collingridge* (1907), 11 C. W. N. 397.

7 *Hullodhur Mookerjee* v. *Ramnauth Mookerjee* (1862), Marsh. 35.

8 *Jhubboo Lall Sahoo* v. *Khoob Lall* (1874), 22 W. R. C. R. 294.

9 Act IV. of 1893 (Partition), s. 4, *post*, p. 357.

10 *Ram Pershad Narain Tewaree* v. *Court of Wards* (1874), 21 W. R. C. R. 152.

whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to 'a coparcener' by partition."[1]

Property in its nature indivisible.

Where property is in its nature indivisible, as, for instance, in the case of animals, furniture, etc., it can be allotted to individual coparceners, corresponding or equivalent parcels of the property being allotted to other coparceners, or the value being made up in money.

Where it is impossible or inequitable to allot a specific item to an individual, as where it consists of a right of way, a passage, a well, a bridge, it may be necessary that the item of property should continue to be jointly enjoyed by the several coparceners.[2]

There is a presumption that a passage remained undivided at the time of the partition.[3]

In some cases it may be necessary to sell the property and adjust the proceeds in the distribution.[4]

Places of worship, etc.

Places of worship and sacrifice,[5] and property dedicated to an idol or to other pious uses, cannot be physically partitioned.[6]

Where merely a charge is created for religious purposes, the property can be alienated or partitioned subject to the charge.[7]

Apart from a dedication, the use to which property has been put, as, for instance, when it has been used as a *poojah dalan*, does not render it impartible, but the Court may, if the circumstances make it equitable, permit that portion to be

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[1] *Ashanullah* v. *Kali Kinkur Kur* (1884), 10 Calc. 675. This was a suit by a purchaser, but the principle applies to any case. See Strange's "Hindu Law," vol. ii. p. 329.

[2] See *Govind Annaji Bodhani* v. *Trimbak Govind Dhaneshwar* (1910), 36 Bom. 275; 12 Bom. L. R. 363.

[3] *Nathubhai Dhirajram* v. *Hansgavri (Bai)* (1912), 36 Bom. 379; 14 Bom. L. R. 418.

[4] See Act IV. of 1893 (Partition), s. 2, *post*, pp. 356, 357.

[5] *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193.

[6] "Gautama Institutes," xxviii. 46; "Sacred Books of the East," vol. ii. p. 306; "Dayabhaga," chap. vi. s. 2, para. 26. *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106. See Bhattacharya's "Law of the Joint Hindu Family," pp. 450, 451.

[7] *Sonatun Bysack* v. *Juggutsoondree Dossee (Sreemutty)* (1859), 8 M. I. A. 66; *Ram Coomar Paul* v. *Jogender Nath Paul* (1878), 4 Calc. 56; 2 C. L. R. 310. *Post*, p. 549.

allotted to a single sharer, and require him to pay owelty of partition (a sum of money as compensation), or to account for its value in the partition.[1]

As to partition of the worship or of the management, see *post*, p. 575.

How Separation and Partition can be effected.

Under the Mitakshara school of law, a father can effect a partition between his sons with or without their consent.[2]

Separation how effected.

Apart from the special powers given to a father by the Mitakshara law, the union of the coparceners in a joint family can be dissolved by any arrangement, express or implied, by which the coparceners alter, or intend to alter, their title as coparceners into a title either as tenants in common or as owners of separate shares, or by any change in the status of the coparceners, which is inconsistent with their being members of a joint family,[3] or by a decree of a competent Court,[4] or by the Revenue authorities.[5]

Parties.

All the coparceners should be parties to a separation or partition by arrangement,[6] the guardian of minor coparceners acting on their behalf.[7]

Partial partition.

By arrangement, the separation or partition may be partial as regards the persons separating, some of the coparceners electing to remain joint, their status *inter se* being unaffected by the separation.[8]

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[1] See *Rajcoomaree Dossee* v. *Gopal Chunder Bose* (1878), 3 Calc. 514.

[2] *Kandasami* v. *Doraisami Ayyar* (1880), 2 Mad. 317; *Murugaya Maniyakaran* v. *Palaniyaudi Maniyakaran* (1916), 31 Mad. L. J. 147. "Mitakshara," chap. i. s. 2, para. 2.

[3] A mere change in the mode of holding the property is not conclusive, *post*, pp. 349, 350.

[4] *Post*, pp. 350–353.

[5] *Post*, pp. 358, 359.

[6] As to the parties to a suit, see *post*, p. 352.

[7] See *ante*, p. 329.

[8] See *Rewun Persad* v. *Radha Beeby (Mussumat)* (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at pp. 156, 157; *Kandasami* v. *Doraisami Ayyar* (1880), 2 Mad. 317, at p. 324; *Radha Churn Dass* v. *Kripa Sindhu Dass* (1879), 5 Calc. 474; 4 C. L. R. 428; *Gavrishankar Parabhuram* v. *Atmaram Rajaram* (1893), 18 Bom. 611; *Anandibai* v. *Hari Suba Pai* (1911), 35 Bom. 293; 13 Bom. L. R. 287; *Jogendra Nath Rai* v. *Baladeo Das* (1907), 35 Calc. 961; 12 C. W. N. 127; *Upendranarain Myti* v. *Gopee Nath Bera* (1883), 9 Calc. 817; 12 C. R. 356. Their relation to those who have separated is as divided members of a family, see *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362; *Kedar Nath (Maharaj)* v. *Ratan Singh*

Coparceners may also by agreement arrange that a portion only of the property should be divided, the remainder remaining joint.[1] They can afterwards partition the remainder of the property.[2]

The fact that there had been a partition of any kind would ordinarily raise a presumption that the coparceners had separated in estate and interest,[3] but such presumption is liable to be rebutted.[4]

For an arrangement providing for a future repartition, see *Duri Bhagavantulu* v. *Tadepatri Veeravadhanulu* (1909), 33 Mad. 246.

"Though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family,[5] yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after partition have been reunited." [6]

Accident, mistake, fraud.

Where, from accident, mistake, or fraud, a portion of the coparcenery property is not included in a partition, such portion must be divided amongst the persons who took under the partition.[7] In other cases a partition is final, and cannot be contested in a subsequent suit.[8]

Where, after the partition, it appears that property allotted

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(*Thakur*) (1910), 37 I. A. 161; 22 All. 415; 14 C. W. N. 985; 12 Bom. L. R. 656. As to the presumption that the remainder of the family is joint, see *ante*, p. 222.

[1] *Muthusami Mudaliar* v. *Nallakulantha Mudaliar* (1894), 18 Mad. 418; *Hoolas Koonwer* (*Mussumat*) v. *Man Singh* (1868), 3 Agra, 37; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 153; *Ajodhya Purshad* v. *Mahadeo Purshad* (1909), 14 C. W. N. 221.

[2] *Jogendra Nath Rai* v. *Baladeo Das* (1907), 35 Calc. 961; 12 C. W. N. 127. See *Shamasoondery Dassee* v. *Kartick Churn Mittra* (1865), Bourke O. C. 326.

[3] *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (1908), 32 Mad. 191; *Rangasami Naidu* v. *Sundarajubu Naidu* (1916), 31 Mad. L. J. 472; see *ante*, p. 222.

[4] See *Timmi Reddy* v. *Achamma* (1865), 2 Mad. H. C. 325.

[5] *Post*, p. 353.

[6] *Hoolas Koonwer* (*Mussumat*) v. *Man Singh* (1868), 3 Agra, 37; *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1901), 25 Mad. 149, at p. 157. See *Peddayya* v. *Ramalingam* (1888), 11 Mad. 406.

[7] See *Jogendra Nath Rai* v. *Baladeo Das* (1907), 35 Calc. 961; 12 C. W. N. 127; *Bhowani Proshad Shahu* v. *Juggernath Shahu* (1909), 13 C. W. N. 309; *Lachman Singh* v. *Sanwal Singh* (1878), 1 All. 543; *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at pp. 451, 469; "Mitakshara," chap. i. s. 9, para. 1; "Dayabhaga," chap. xiii. paras. 1–3; "Vyavahara Mayukha," chap. iv. s. 6, para. 3.

[8] See *Bhaiaji Thakur* v. *Jharula Dass* (1914), (P. C.) 18 C. W. N. 1029.

to one of the coparceners did not belong to the coparcenary,[1] or that a valid charge existed thereon,[2] the coparcener to whom such property was allotted can insist upon the partition being reopened, or, at any rate, can claim compensation from the other parties to the partition.

A partition in title, *i.e.* a separation in estate, can be effected, although there be no partition by metes and bounds.[3]

Partition by metes and bounds unnecessary.

A separation in estate has no application to impartible property, as there is nothing upon which such separation can operate.[4]

The effect of this separation is to exclude rights of survivorship according to Mitakshara law, and to make the parties tenants in common as to the property.[5]

There may be a separation of the members of the family and at the same time an arrangement for the sake of convenience that the property, or a portion of it,[6] should remain joint, but be held in defined shares. In that case the rights of the separating coparceners *inter se* are those of ordinary tenants in common, and are free from the incidents applicable to a joint family.[7]

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[1] *Maruti* v. *Rama* (1895), 21 Bom. 333.

[2] *Lakshman* v. *Gopal* (1898), 23 Bom. 385.

[3] *Parbati* (*Musammat*) v. *Naunihal Singh* (*Chaudhri*) (1909), 36 I. A. 71; 31 All. 412; 13 C. W. N. 983; 11 Bom. L. R. 878; *Raghubir Singh* v. *Moti Kunwar* (1912), 35 All. 41; 17 C. W. N. 453; 15 Bom. L. R. 426; *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139, at p. 148; 30 Calc. 738, at p. 751; 7 C. W. N. 578, at p. 589; 5 Bom. L. R. 461; *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75; 8 W. R. P. C. 1; *Radhika Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) (1870), 13 M. I. A. 497; 6 B. L. R. 202; 14 W. R. P. C. 33; *Doorga Pershad* (*Baboo*) v. *Kundun Koowar* (*Mussumat*) (1873), 1 I. A. 55; 13 B. L. R. 235; 21 W. R. C. R. 214; *Jusoda Koonwur* (*Mussamut*) v. *Gourie Byjonath Sohae Singh* (1866), 6 W. R. C. R. 139; *Sreepershad* (*Lalla*) v. *Akoonjoo Koonwar* (*Mussamut*) (1867), 7 W. R. C. R. 488; *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116; *Badaruth Tewary* v. *Jagurnath Dass* (1869), 1 N. W. P. 75; *Jeoneee* (*Mussumat*) v. *Dhurum Kooer* (1871), 3 N. W. P. 108; *Sobha Kooeree* (*Mussamut*) v. *Hurdey Narain Mohajun* (1876), 25 W. R. C. R. 97.

[4] *Ante*, p. 264.

[5] Cf. *ante*, p. 219.

[6] *Patni Mal* (*Rajah*) v. *Manohar Lal* (*Ray*) (1834), 5 Bom. Sel. R. 349 (2nd ed., 410).

[7] *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75; 8 W. R. P. C. 1; *Narayan Ayyar* v. *Lakshmi Ammal* (1867), 3 Mad. H. C. 289; *Venkata Gopalla Narasimha Row Bahadoor* (*Rajah Suraneni*) v. *Lakshma Venkama Row* (*Rajah Suraneni*) (1869), 13 M. I. A. 113; 3 B. L. R. P. C. 41; 12 W. R. P. C. 40; S. C. in Court below, (1866), 3 Mad. H. C. 40. See *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533; 1 Bom. L. R. 388; *Muhesh Doobey* v. *Kishun Doobey* (1869), 1 N. W. P. 42.

There would, in the absence of a valid agreement,[1] be a right to enforce a partition of such property by metes and bounds subsequently.[2]

Any instrument whereby co-owners of any property divide any property in severalty is an instrument of partition.[3]

A separation or a partition can be effected without an instrument in writing.[4]

Question is one of intention.

"The true test of partition of property, according to Hindu law, is the intention of the family to become separate owners."[5]

The question is one of intention merely, viz. whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, was to effect a division such as to alter the status of the family.[6]

Agreement to separate.

An agreement between the coparceners to hold and enjoy the property in severalty operates as a separation in estate, although there may have been no actual partition by metes and bounds,[7] and although the separate possession and enjoyment be postponed until the agreement be fully carried into effect.[8]

"When the members of an undivided family agree among themselves

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[1] As to an agreement not to partition, see *ante*, p. 325.

[2] *Lade* v. *Sadashiva* (1904), 6 Bom. L. R. 35. See *Subbaraya Tawker* v. *Rajaram Tawker* (1901), 25 Mad. 585.

[3] *In re Govind Pandurang Kamat* (1910), 35 Bom. 75; 12 Bom. L. R. 936.

[4] *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Budha Mal* v. *Bhagwan Das* (1890), 18 Calc. 302; *Latchumammal* v. *Gangammal* (1910), 34 Mad. 72. By Act II. of 1884, effect was given to unregistered partition deeds which had been executed in the Madras Presidency.

[5] *Ram Pershad Singh* v. *Lakhpati Koer* (1902), 30 I. A. 1, at p. 10; 30 Calc. 23, at p. 253; 7 C. W. N. 162, at p. 168; 5 Bom. L. R. 103.

[6] *Doorga Pershad* (*Baboo*) v. *Kundun Koonwar* (*Mussumat*) (1873), 1 I. A. 55, at p. 68; 13 B. L. R. 235, at p. 239; 21 W. R. C. R. 214, at p. 215; *Balkishen Das* v. *Ram Narain Sahu* (1903), 30 I. A. 139, at p. 147; 30 Calc. 738, at p. 750; 7 C. W. N. 578, at p. 588.

[7] *Appovier* v. *Rama Subba Aiyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1; *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 136; 30 Calc. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; *Raghubir Singh* v. *Moti Kunwar* (1912), 35 All. 41; 17 C. W. N. 453; 15 Bom. L. R. 426; *Brijraj Singh* v. *Sheodan Singh* (1913), 40 I. A. 161; 35 All. 337; 17 C. W. N. 949; 15 Bom. L. R. 652; *Venkata Gopalla Narasimha Roy Bahadoor* (*Raja Suraneni*) v. *Lakshama Venkama Row* (*Raja Suraneni*) (1869), 13 M. I. A. 113; 3 B. L. R. P. C. 41; 12 W. R. P. C. 40; *Doorga Pershad* (*Baboo*) v. *Kundun Kowar* (*Mussumat*), 1 I. A. 55; 13 B. L. R. 235; 21 W. R. C. R. 214; *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157.

[8] *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96, at p. 103.

with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares,[1] then the character of undivided property and joint enjoyment is taken from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." [2]

An arrangement by which property was allotted to a younger brother for his maintenance does not alter the course of descent of the property.[3]

The legal construction of the agreement cannot be controlled or altered by the subsequent conduct of the parties,[4] except where there has been in law a valid reunion.[5]

Mere agreement to divide. It has been held that where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is of itself insufficient to effect a separation.[6]

A separation between members of a joint Hindu family followed by a partition between them of the ancestral property, which would not put an end to their coparcenary rights, is unknown to the law.[7]

Definition in petitions, etc. The fact that in documents executed by the coparceners, such as petitions to the Revenue or other authorities, or under the Land Registration Act,[8] there is a definition of an interest in the joint estate, in terms of a fraction of the whole, without any indication of an intention to divide interests and liabilities, is insufficient to constitute a legal dissolution of a joint family,

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[1] A mere definement of shares is not sufficient, see cases, *post*, p. 348, note 1, and pp. 348–350.

[2] *Appovier* v. *Rama Subba Aiyyan* (1866), 11 M. I. A. 75, at p. 90; 8 W. R. P. C. 1. See *Hurdwar Singh* v. *Luchmun Singh* (1868), 3 Agra, 41; *Ananta Balacharya* v. *Damodhar Makund* (1888), 13 Bom. 25; *Parsotam Rao Tantia* v. *Janki Bai* (1907), 29 All. 354; *Madho Parshad* v. *Mehrban Singh* (1890), 17 I. A. 194; 18 Calc. 157; *Budha Mal* v. *Bhagwan Das* (1890), 18 Calc. 302; *Shibnarain Bose* v. *Ram Nidhee Bose* (1868), 9 W. R. C. R. 87; *Kulponath Doss* v. *Mewah Lall* (1867), 8 W. R. C. R. 302; *Deo Bunsee Kooer* (*Mussamut*) v. *Dwarkanath* (1868), 10 W. R. C. R. 273; S. C. *Deowanti Kunwar* (*Mussamut*) v. *Dwarkanath*, 8 B. L. R. 363, note (a case of the separation of two branches of a family).

[3] *Rajya Lakshmi Devi Garu* (*Sri Raja Viravara Thodramal*) v. *Surya Narayana Dhatrazu Bahadur Garu* (*Sri Raja Viravara Thodramal*) (1897), 24 I. A. 118; 20 Mad. 256.

[4] *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139; 30 Calc. 738; 7 C. W. N. 578; 5 Bom. L. R. 461.

[5] *Post*, pp. 359, 360.

[6] *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157.

[7] *Ekradeswar Singh* v. *Jameshwari Babuasin* (1914), 41 I. A. 235, at p. 283; 42 Calc. 582, at p. 599; 18 C. W. N. 1249, at pp. 1255, 1256; 17 Bom. L. R. 18, at p. 26.

[8] Act VII. (B. C.) of 1876.

although it is evidence of a separation.[1] Separation may be inferred from definement of shares, followed by entries of separate interests in the Revenue records.[2]

Sale of share.

When a co-sharer sells his rights in the family property to another coparcener, such sale amounts to a separation, so far as the vendor is concerned.[3]

Act or declaration by one coparcener.

An unequivocal act or a definite and clear declaration by a coparcener, showing his intention to hold his share separately, may effect a separation.[4]

This being so, the mere filing of a suit for partition would operate to effect a separation.[5]

As to the effect of a decree for partition, see *post*, pp. 350, 351.

It is submitted that a mere expression of intention is not sufficient, but action of some kind in furtherance of such intention is required in order to effect a separation. An agreement is not necessary, as a coparcener is entitled as of right to effect a separation.[6]

Loss of share by limitation.

A loss by a co-sharer of his rights by operation of the law of limitation amounts to a separation of that co-sharer, so far as the family property is concerned.[7]

Bengal school.

As under the Bengal school each coparcener has a defined share the distinction between separation and partition by metes and bounds has not

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[1] *In the matter of Phuljhari Koer (Mussamat)* (1872), 8 B. L. R. 385; 17 W. R. C. R. 102; *Muktakasi Debi* v. *Ubabati* (1870), 8 B. L. R. 396, note; 14 W. R. C. R. 31; *Ambika Dat* v. *Sakhmani Kuar* (1877), 1 All. 437; *Hoolash Koer* v. *Kassee Proshad* (1881), 7 Calc. 369.

[2] *Ram Lal* v. *Debi Dat* (1888), 10 All. 490; see *post*, p. 349.

[3] *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54. See *Appa Pillai* v. *Runga Pillai* (1882), 6 Mad. 71, as to an arrangement without consideration.

[4] *Suraj Narain* v. *Ikbal Narain* (1912), 40 I. A. 40; 35 All. 80; 17 C. W. N. 333; 15 Bom. L. R. 456; *Girja Bai* v. *Sadashiv Dhundiraj* (1916), 43 I. A. 151; 43 Calc. 1031; 20 C. W. N. 1085; 18 Bom. L. R. 621; *Baijnath Prasad Singh* v. *Tej Bali Singh* (1916), 38 All. 590, at p. 611; *Raghubanund Doss* v. *Sadhuchurn Doss* (1878), 4 Calc. 425; 3 C. L. R. 534; *Bulakee Lall* v. *Indurputtee Kowar (Mussamut)* (1865), 3 W. R. C. R. 41; *Vato Koer (Mussamut)* v. *Rowshun Singh* (1867), 8 W. R. C. R. 82; *Sudaburt Pershad Sahoo* v. *Lotf Ali Khan* (1870), 14 W. R. C. R. 339, at pp. 345, 346; *Joynarain Giri* v. *Goluck Chunder Mytee* (1876), 25 W. R. C. R. 355. The appeal from this last decision was decided on another ground, 5 I. A. 228; 4 Calc. 434. See *Phoolbas Kooer (Musst.)* v. *Juggessur Sahoy (Lalla)* (1872), 18 W. R. C. R. 48; *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510.

[5] *Girja Bai* v. *Sadashiv Dhundiraj* (1916), 43 I. A. 151; 20 C. W. N. 1085; *Kawal Nain* v. *Prabhu Lal* (1917), 44 I. A. 159; *Soundararajan* v. *Arunachalam Chetty* (1915) 39 Mad. 159. A suit for possession of a share would not be sufficient: *In the matter of Phul Koeri* (1869), 8 B. L. R. 388, note; S. C. *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510.

[6] *Ante*, p. 325.

[7] See *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 452.

the same importance as under the Mitakshara school, but there may be such a distinction when a claim is made by the family to property which was acquired by the coparcener before separation.

Proof of separation.

Separation may be proved by acts or declarations [1] which show such agreement and intention to separate, such as cesser of commensality,[2] separate occupation of portions of the property,[3] separate enjoyment of distinct shares of the profits,[4] separate definement of shares in the Revenue records,[5] agreement to divide the proceeds in definite shares,[6] or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others.[7]

Mere cesser of commensality,[8] or of co-worship,[9] division of the income,[10]

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[1] *Jivubai* v. *Krishnaji* (1904), 6 Bom. L. R. 351.

[2] See *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussummat*) (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; 6 Bom. L. R. 1; *Joynarain Giri* v. *Goluck Chunder Mytee* (1876), 25 W. R. C. R. 355.

[3] *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar* (1890), 15 Bom. 201; *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 453; *Surbessur Methoor* v. *Gossain Doss Methoor* (1872), 17 W. R. C. R. 210.

[4] *Chyet Narain Singh* v. *Bunwaree Singh* (1875), 23 W. R. C. R. 395; *Jeonee* (*Mussumat*) v. *Dhurum Kooer* (1871), 3 N. W. P. 108; *Kalika Sahoy* v. *Gouree Sunkur* (1869), 12 W. R. C. R. 287; *Mohabeer Pershad* (*Lalla*) v. *Kundun Koowar* (*Mussamut*) (1867), 8 W. R. C. R. 116; *Adi Deo Narain Singh* v. *Dukharam Singh* (1883), 5 All. 532; *Mohroo Kooeree* (*Musst.*) v. *Gunsoo Kooeree* (*Musst.*) (1867), 8 W. R. C. R. 385.

[5] *Ram Lal* v. *Debi Dat* (1888), 10 All. 490; *Ram Pershad Singh* v. *Lakhpati Koer* (1902), 30 I. A. 1; 30 Calc. 231; 7 C. W. N. 162; 5 Bom. L. R. 103. See *Ambika Datt* v. *Sukhmani Kuar* (1877), 1 All. 437. See *ante*, p. 347.

[6] *Ram Kissen Singh* (*Maharajah*) v. *Sheonund Singh* (*Rajah*) (1875), 23 W. R. C. R. 412.

[7] *Munshi Ram* v. *Gainda Mal* (1914), 16 Punj. L. R. 319; *Sumundra Koonwar* v. *Kalee Churn Singh* (1870), 13 W. R. C. R. 197; 8 B. L. R. 390, note. "Narada," chap. xiii. paras. 40, 41; "Dayabhaga," chap. xiv. paras. 7, 8, 9; Colebrooke's "Digest," vol. iii. p. 407.

[8] *Suraj Narain* v. *Ikbal Narain* (1912), 40 I. A. 40; 35 All. 80; 17 C. W. N. 333; 15 Bom. L. R. 456; *Ganesh Dutt Thakoor* (*Chowdhry*) v. *Jewach Thakoorain* (*Mussummat*) (1903), 31 I. A. 10; 31 Calc. 262; 8 C. W. N. 146; *Rewun Pershad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 168; 7 W. R. P. C. 35, at p. 37; *Anundee Koonwur* (*Mussumat*) v. *Khedoo Lal* (1872), 14 M. I. A. 412; 18 W. R. C. R. 69; *Belas Koer* (*Mussamut*) v. *Bhowanee Buksh* (*Baboo*) (1863), Marsh. 641; *Chhabila Manchand* v. *Jadavbai* (1866), 3 Bom. H. C. O. C. 87; *Kristnappa Chetty* v. *Ramasawmy Iyer* (1875), 8 Mad. H. C. 25; *Shibnarain Bose* v. *Ram Nidhee Bose* (1868), 9 W. R. C. R. 87; *Jivubai* v. *Krishnaji* (1904), 6 Bom. L. R. 351. See *Khilut Chunder Ghose* v. *Koonjlal Dhur* (1868), 11 B. L. R. 194, note; 10 W. R. C. R. 333.

[9] *Suraj Narain* v. *Ikbal Narain* (1912), 40 I. A. 40; 35 All. 80; 15 C. W. N. 333; 15 Bom. L. R. 456.

[10] *Sonatun Bysack* v. *Juggutsoondree Dossee* (1859), 8 M. I. A. 66, at p. 86.

definement of shares in the revenue [1] or land registration [2] records, separate occupation of portions of the property,[3] or separate collections of rents,[4] or separate dealings,[5] are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation.[6]

The fact that a man availed himself of his near agnatic relations in the administration of his property at the same time that he gave them maintenance and paid the expenses of their marriage and other ceremonies is not inconsistent with his position as a separated member.[7]

An act of a stranger, as, for instance, the attachment of a share under sec. 88 of the Indian Criminal Procedure Code (Act V. of 1898), does not effect a separation.[8]

Conversion from Hinduism.

Conversion to Mahomedanism,[9] or to Christianity,[10] *ipso facto* separates the convert from the coparcenery.

Decree for partition.

A decree for partition is on the same footing as an agreement for partition.[11]

Decree.

A decree declaring the shares [12] or directing partition,[13] or a decree giving effect to a suit, which, though not in terms

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[1] *Ram Singh* v. *Tursa Kunwar* (*Musst.*) (1913), 17 C. W. N. 1085; 15 Bom. L. R. 863; *Ambika Dat* v *Sukhmani Kuar* (1877), 1 All. 437, commented on in *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96, at p. 104; *Gajendar Singh* v. *Surdar Singh* (1896), 18 All. 176.

[2] *Hoolash Kooer* v. *Kassee Proshad* (1881), 7 Calc. 369.

[3] *Runjeet Singh* v. *Gujraj Singh* (*Kooer*) (1873), 1 I. A. 9; *Babashet* v. *Jirshet* (1868), 5 Bom. H. C. A. C. 71; *Moro Vishvanath* v. *Ganesh Vithal* (1873), 10 Bom. H. C. 444, at p. 453; *Chhabila Manchand* v. *Judavbai* (1866), 3 Bom. H. C. O. C. 87. See *Luchmun Pershad* v. *Moonee Koonwer* (*Mussumat*) (1866), 1 Agra, 220.

[4] *Badamoo Kooer* v. *Wazeer Sing* (1866), 5 W. R. C. R. 78, differed from in *Vato Koer* (*Mussumut*) v. *Rowshun Singh* (1867), 8 W. R. C. R. 82.

[5] *Kristnappa Chetty* v. *Ramasawmy Iyer* (1875), 8 Mad. H. C. 25.

[6] See *Jagun Kooer* v. *Rughoonundun Lall Shahoo* (1868), 10 W. R. C. R. 128.

[7] *Deoki Singh* v. *Anupa* (*Musammat*) (1905), 10 C. W. N. 338.

[8] See *Secretary of State* v. *Rangasami Ayyangar* (1916), 39 Mad. 831.

[9] *Gobind Krishna Narain* v. *Abdul Qayyum* (1903), 25 All. 564, at p. 573; *Gobind Krishna Narain* v. *Khunni Lal* (1907), 29 All. 487. This decision was reversed on appeal on another point, *post*, p. 374, note 10, see *ante*, p. 24.

[10] *Abraham* v. *Abraham* (1863), 9 M. I. A. 199, at p. 241; 1 W. R. P. C. 1, at p. 5; *Kulada Prasad Pandey* v. *Haripada Chatterjee* (1912), 40 Calc. 407; 17 C. W. N. 102; see *ante*, p. 23, note 7.

[11] *Tej Protap Singh* v. *Champa Kalee Koer* (1885), 12 Calc. 96; *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157.

[12] See *Babaji Akoba* v. *Dattu Laxman* (1912), 37 Bom. 64; 14 Bom. L. R. 923.

[13] *Chidambaram Chettiar* v. *Gouri Nachiar* (1879), 6 I. A. 177; 2 Mad. 83; *Subbaraya Mudali* v. *Manika Mudali* (1896), 19 Mad. 345; *Lade* v. *Sadashiva* (1904), 6 Bom. L. R. 35; *Narayana* v. *Ramalinga* (1915), 39 Mad. 587. In *Babaji Parshram* v. *Kashibai* (1879), 4 Bom. 157, a mere decree for partition was held not to operate as a separation.

seeking a partition, indicates a distinct intention of obtaining a separation in estate, or an award by arbitrators,[1] operates as a separation.[2]

The fact that the decree postpones the vesting of the share does not make any difference.[3]

According to the preponderance of authority the decree creates a severance pending an appeal,[4] and it is clear that if pending the appeal the parties treat the decree as creating a severance it has such effect.[5]

Where, in a suit for general partition of a family estate, the plaintiff succeeded with regard only to a small portion thereof, it was held that the family did not in consequence of these proceedings become a divided one.[6]

In a case under the Bengal school of law, where the parties disregarded the decree, and continued to live as a joint family, it was held that there was no separation.[7]

Order for sale of share. An order for sale of a share of family property in execution of decree would not create a separation.[8]

"The disruption of a joint family cannot be effected by an order of Court against the intention of the parties, unless it be followed by an actual conversion of the joint tenancy into a tenancy in common, or an actual partition by metes and bounds." [9]

Suit for partition. A suit for partition may be brought by a person who is entitled to a partition.[10]

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[1] *Krishna Panda* v. *Balaram Panda* (1896), 19 Mad. 290; *Subbaraya Chetti* v. *Sadasiva Chetti* (1897), 20 Mad. 490.

[2] *Joy Narain Giri* v. *Grish Chunder Myti* (1878), 5 I. A. 228; 4 Calc. 434, distinguishing *Debee Pershad* v. *Phool Koeree* (1869), 12 W. R. C. R. 510. The mere determination of the shares by a preliminary decree is not tantamount to partition, although it may effect a severance of the joint interest: *Jogendra Nath Rai* v. *Baladeo Das* (1907), 35 Calc. 961, at p. 966; 12 C. W. N. 127, at p. 129.

[3] *Lakshman Darku* v. *Narayan Lakshman* (1899), 24 Bom. 182.

[4] *Thandayuthapani Kangiar* v. *Rangunatha Kangiar* (1911), 35 Mad. 239, dissenting from *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (1881), 6 Bom. 3; *Subbaraya Mudali* v. *Manika Mudali* (1896), 19 Mad. 345; *Mahadev Laxman* v. *Govind Parashram* (1912), 36 Bom. 550; 14 Bom. L. R. 733.

[5] See *Joynarain Giri* v. *Grish Chunder Myti* (1878), 5 I. A. 228; 4 Calc. 434.

[6] *Mallikarjuna Prasada Nayudu (Raja Yarlagadda)* v. *Durga Prasada Nayudu (Raja Yarlagadda)* (1900), 27 I. A. 151; 24 Mad. 147; 5 C. W. N. 74; 2 Bom. L. R. 350.

[7] *Prawn Kissen Mitter* v. *Ram Sunderee Dossee (Sreemutty)* (1842), Fulton, 410. See *Babaji Parsham* v. *Kashibai* (1879), 4 Bom. 157.

[8] *Mudit Narayan Singh* v. *Ranglal Singh* (1902), 29 Calc. 797, at p. 801.

[9] *Ibid.*

[10] See *ante*, pp. 325–329, as to who is entitled to partition.

A suit cannot be brought for a mere declaration of right to a share, if a partition is possible.[1]

Limitation. A suit for partition is barred when twelve years have expired from the time when exclusion of the plaintiff from the coparcenary property becomes known to him.[2]

Res judicata. A decree in such suit bars the trial in another suit of questions determined in that suit.[3]

Receiver. A receiver of the whole property may be appointed in a partition suit.[4]

Parties to suits. All persons entitled to a share on partition, including the wife, mother, or grandmother, and purchasers of undivided shares [5] or mortgages, should be parties to a suit for partition.[6]

Property in suit. A suit for partition must include all the property which is partible [7] and available for partition at the time,[8] and is within the limits of the jurisdiction of the Court in which the suit is brought.[9]

There is authority that when the suit does not include all the

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[1] *Suryanarayana Murti* v. *Tammanna* (1901), 25 Mad. 504.

[2] Act IX. of 1908, Sched. I. art. 127. See *Suroda Soondury Dossee* v. *Doyamoyce Dossee* (1880), 5 Calc. 938; *Jaganatha* v. *Ramabhadra* (1888), 11 Mad. 380; *Dhoorjeti Subbaya* v. *Dhoorjeti Venkayya* (1906), 30 Mad. 201; *Ajodhya Purshad* v. *Mahadeo Purshad* (1909), 14 C. W. N. 221; *Babaji Akoba* v. *Dattu Laxman* (1912), 37 Bom. 64; 14 Bom. L. R. 923; *Manjaya* v. *Shanmuga* (1913), 38 Mad. 684.

[3] *Parsotam Rao Tantia* v. *Radha Bai* (1910), 32 All. 469; *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (1914), 41 I. A. 247; 19 C. W. N. 31; 17 Bom. L. R. 1.

[4] *Poreshnath Mookerjee* v. *Omerto Nauth Mitter* (1890), 17 Calc. 614.

[5] *Ante*, p. 331. *Laljeet Singh* v. *Raj Coomar Singh* (1873), 12 B. L. R. 373, at p. 383; 20 W. R. C. R. 336, at p. 340.

[6] Civil Procedure Code (Act V. of 1908), order i. rules 3, 4; Act XIV. of 1882, ss. 26, 28; *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (1914), 41 I. A. 247; 19 C. W. N. 531; 17 Bom. L. R. 1; *Pahaladh Singh* v. *Luchmunbutty* (*Mussamut*) (1869), 12 W. R. C. R. 256.

[7] Civil Procedure Code, 1908, Sched. I. order ii. r. 1; Act XIV. of 1882, s. 43; *Hasmat Rai* (*Koer*) v. *Sunder Das* (1885), 11 Calc. 396, and cases, note 8 below; *Trimbak Dixit* v. *Narayan Dixit* (1874), 11 Bom. H. C. 69; *Ganpat* v. *Annaji* (1898), 23 Bom. 144; *Nanabhai Vallabhdas* v. *Nathabhai Haribhai* (1870), 7 Bom. H. C. A. C. 46; *Narayan Babaji* v. *Nana Manohar* (1870), 7 Bom. H. C. A. C. 153, at p. 178; *Haridas Sanyal* v. *Pran Nath Sanyal* (1886), 12 Calc. 566. *Contrâ Padmamani Dasi* (*Srimati*) v. *Jagadamba Dasi* (*Srimati*), 6 B. L. R. 134, at p. 140. See *Parbati Churn Deb* v. *Ain-ud-deen* (1881), 7 Calc. 577; 9 C. L. R. 170.

[8] See *Pattaravy Mudali* v. *Audimula Mudali* (1870), 5 Mad. H. C. 419. Thus, where property has been mortgaged with possession it need not be brought into the partition: *Kristayya* v. *Narasimham* (1900), 23 Mad. 608; *Balkrishna Vithal* v. *Hari Shankar* (1871), 8 Bom. H. C. A. C. 64; *Narayan Babaji* v. *Pandurang Ramchandra* (1875), 12 Bom. H. C. 148, at p. 155; *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128; 1 Bom. L. R. 620.

[9] *Punchanun Mullick* v. *Shib Chunder Mullick* (1887), 14 Calc. 835.

coparcenary property the suit should be dismissed,[1] but it is submitted that where the objection is raised, the proper course is to permit the plaintiff to amend his plaint so as to include the whole property.[2]

Where by mistake or fraud property is omitted from the partition a subsequent suit lies.[3]

In a suit filed in the ordinary original jurisdiction of a High Court there is no difficulty in including other property after an interlocutory decree for partition.

In a suit for partition the judge must first find that the plaintiff had a title to the property.[4]

A defendant may insist that joint property which is not mentioned in the plaint be brought into the partition,[5] even if it be situate outside the territorial jurisdiction of the Court in which the suit is brought,[6] provided it can be dealt with in the suit, but he cannot require the plaintiff to bring into the partition land which is outside British India.[7]

Partial partition.

Where no objection is raised by the parties there seems to be no reason why a partial partition, which is partial either as to property [8] or as to the parties, should not be effected even in a suit.[9]

There would be a right to subsequent partition.[10]

Property within different jurisdictions.

When the coparcenary property is situate within the jurisdiction of more than one Court, suits can be brought in the several Courts having jurisdiction.[11]

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[1] See *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1886), 14 Calc. 122; *Ramjoy Ghose* v. *Ram Runjun Chuckerbutti* (1881), 8 C. L. R. 367; *Haridas Sanyal* v. *Pran Nath Sanyal* (1886), 12 Calc. 566.

[2] See *Punchanun Mullick* v. *Shib Chunder Mullick* (1887), 14 Calc. 835; *Mukunda Lal Chakravarti* v. *Jogesh Chunder Chakravarti* (1916), 20 C. W. N. 1276; 1 Patna L. J. 393.

[3] *Mukunda Lal Chakravarti* v. *Jogesh Chunder Chakravarti* (1916), 20 C. W. N. 1276; 1 Patna L. J. 393.

[4] *Shashi Bhushan Beed* v. *Jotindra Nath Roy Chowdhry* (1911), 38 Calc. 681.

[5] See *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128; 1 Bom. L. R. 620.

[6] *Hari Narayan Brahme* v. *Ganpatrav Daji* (1883), 7 Bom. 272; *Lalljeet Singh (Baboo)* v. *Raj Coomar Singh (Baboo)* (1876), 25 W. R. 353; *Ram Lochun Pattuck* v. *Rughoobur Dyal* (1871), 15 W. R. C. R. 111; *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922, at p. 928.

[7] *Ramacharya* v. *Anantacharya* (1893), 18 Bom. 389; *Purushottam* v. *Atmaram* (1899), 23 Bom. 597; 1 Bom. L. R. 76.

[8] See *Chandar Shekhar* v. *Kundan Lal* (1908), 31 All. 3.

[9] See *Manjanatha Shanabhaga* v. *Narayana Shanabhaga* (1882), 5 Mad. 362. As to a partial partition by arrangement, see *ante*, p. 344.

[10] *Bhowani Proshad Shahu* v. *Juggenath Shahu* (1909), 13 C. W. N. 309; *Moonsharam Chakravarty* v. *Gonesh Chandra Chakravarty* (1912), 17 C. W. N. 521; see *ante*, p. 341.

[11] *Subba Rau* v. *Rama Rau* (1867), 3 Mad. H. C. 376; *Punchanun Mullick* v. *Shib Chunder Mullick* (1887),

When there is property of the family held jointly by the whole family with other persons, a separate suit should be brought for partition of such property,[1] except where such persons have bought the interests of coparceners in the whole coparcenary property.

A separate suit will lie with regard to property which belongs to some of the coparceners only.[2]

Purchaser of share.

A purchaser of a share of one of the coparceners in a portion of the coparcenary property is, when such purchase is permissible,[3] entitled to bring a suit for partition of that portion only, when such partial partition will not cause much inconvenience to the other sharers,[4] but any coparcener may require his share in the whole of the coparcenary property to be ascertained and partitioned in such suit.[5]

A coparcener is entitled to bring against such purchaser a partition suit limited to the property so purchased.[6]

As to the rights of purchasers or mortgagees of shares on a partition, see *ante*, pp. 301–303.

Where a portion of the family property has passed entirely into the hands of strangers, there is no reason why the right thereto should not be determined without reference to the remaining property of the family.[7]

Inquiry as to property.

In the case of a decree for partition and of a partition by arrangement, it is necessary to ascertain the amount of the coparcenary property, and what is available for partition.

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14 Calc. 835; *Balaram Bhaskarji* v. *Ramchandra Bhaskarji* (1898), 22 Bom. 922. See *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (1880), 4 Bom. 482; *Padmamani Dasi (Srimati)* v. *Jagadamba Dasi (Srimati)* (1871), 6 B. L. R. 134; *Ram Harakh* v. *Ram Lal* (1916), 38 All. 217. Cf. *Abdul Karim Sahib* v. *Badrudeen Sahib* (1904), 24 Mad. 216.

[1] See *Purushottam* v. *Atmaram Janardan* (1899), 23 Bom. 597; 1 Bom. L. R. 76.

[2] *Lachmi Narain* v. *Janki Das* (1901), 23 All. 216.

[3] *Ante*, pp. 301, 302.

[4] *Hari Kristna Chowdary (Duvvada)* v. *Venkata Lakshmi Narayana (Sripada)* (1910), 34 Mad. 402. A different view was taken in *Manjaya* v. *Shanmuga* (1913), 38 Mad. 684.

[5] *Murarrao* v. *Sitaram* (1898), 23 Bom. 184; *Shivmurteppa* v. *Virappa* (1899), 24 Bom. 128; 1 Bom. L. R. 620; see *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Ram Mohan Lal* v. *Mulchand* (1905), 28 All. 39; *Iburamsa Rowthan* v. *Theruvenkatasami Naick* (1910), 34 Mad. 269. See *Venkatarama* v. *Meera Labai* (1859), 13 Mad. 275, approved of in *Palani Konan* v. *Masa Konan* (1896), 20 Mad. 243; *Subramanya Chettyar* v. *Padmanobha Chettyar* (1896), 19 Mad. 267. See, however, *Hasmat Rai (Koer)* v. *Sunder Das* (1885), 11 Calc. 396, at p. 399.

[6] *Ram Charan* v. *Ajudhia Prasad* (1905), 28 All. 50; *Chinna Sanyasi Razu (Sripati)* v. *Suriya Razu (Sripati)* (1882), 5 Mad. 196; *Subramanya Chettyar* v. *Padmanabha Chettyar* (1896), 19 Mad. 267. See *Venkayya* v. *Lakshmayya* (1892), 16 Mad. 98.

[7] *Subbarazu* v. *Venkataratnam* (1891), 15 Mad. 234.

The presumption is that, "in the absence of evidence, the property for partition is such as exists at the time of the suit for partition." [1]

An inquiry as to what the coparcenary property consists of generally involves, it is submitted, an account of the rents and profits which have been received by the manager.[2]

Account of mesne profits.

Where one member of the family has been entirely excluded from the enjoyment of the property, he would be entitled to an account of mesne profits on an ordinary footing.[3]

An account of mesne profits is also allowed when an arrangement for the enjoyment of the property in specific and definite shares has been disturbed [4]

Improvements.

In the absence of an express agreement, a coparcener is not entitled to credit for sums laid out by him in the improvement or upkeep of the coparcenary property.[5]

Provision for debts, etc.

Provision must first be made for all debts due by the family as such,[6] including debts due by the father of separating brothers,[7] and also for all proper charges upon the family property for maintenance,[8] the marriages of dependent female members,[9] the expenses of whose marriages are not payable out of individual shares, and such religious ceremonies as are payable by the whole family,[10] and cannot be adjusted so as to be paid out of individual shares.

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[1] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 9 Bom. 271, at p. 279.

[2] See *ante*, p. 272.

[3] *Krishna* v. *Subbanna* (1884), 7 Mad. 564; *Bhivrav* v. *Sitaram* (1894), 19 Bom. 532; *Konerrav* v *Gurrav* (1881), 5 Bom. 589, at p. 595; *Venkata Narasimha Appa Row Bahadur* (*Rajah*) v. *Narayya Appa Row Bahadur* (*Rajah*) (1879), 7 I. A. 38, at p. 51; 2 Mad. 128, at p. 137; 6 C. L. R. 153, at p. 162. See Civil Procedure Code (Act V. of 1908), order xx. rule 12.

[4] *Shankar Baksh* v. *Hardeo Baksh* (1888), 16 I. A. 71; 16 Calc. 397. See *Ramabhadra* (*Rajah Setrucherla*) v. *Virabhadra Suryanarayana* (*Rajah Setrucherla*) (1899), 26 I. A. 167; 22 Mad. 470; 3 C. W. N. 533; 1 Bom. L. R. 388.

[5] *Muttusvami Gaundan* v. *Subbiramaniya Gaundan* (1863), 1 Mad. H. C. 309. See *post*, p. 356.

[6] See *ante*, p. 276.

[7] *Tara Chand* v. *Reeb Ram* (1866), 3 Mad. H. C. 177, at p. 181; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561; "Dayabhaga," chap. i. para. 47; "Vyavahara Mayukha," chap. iv. s. 6, paras. 1, 2; chap. v. s. 5, para. 14; Colebrooke's "Digest," vol. iii. pp. 73, 389, 390.

[8] *Ante*, pp. 234, 235, 271.

[9] "Dayabhaga," chap. iii. s. 2, para. 39; "Mitakshara," chap. i. s. 7, para. 5; Colebrooke's "Digest," vol. iii. p. 96; Strange's "Hindu Law," vol. ii. p. 313.

[10] As to the expenses of initiation, see "Mitakshara," chap. i. s. 7, paras. 3, 4; "Dayabhaga," chap. iii. s. 2, para. 41; Colebrooke's "Digest," vol. iii. pp. 96, 97; *Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (1914), 38 Mad. 556. As to the funeral expenses of the mother, see *Vaidyanatha Aiyar* v. *Aiyasami Aiyar* (1908), 32 Mad. 191. In a suit for partition brought by a Hindu against his father and brothers, the brothers (but not the children of brothers) are entitled to have set apart from the family property a sum sufficient to defray the expenses of

No provision is to be made for the expenses of the marriage of a coparcener who was unmarried at the time of the severance of the joint family.[1]

An arrangement may be made for the expenses of the marriages of the daughters of brothers, who are making the partition.[2]

Each member of the coparcenary is obliged to bring into hotchpot, and submit to partition any coparcenary property, or property acquired from coparcenary funds which may be in his hands.[3]

He is not required to account for money which has been received by him for his expenses.[4]

Where a single coparcener has purported to deal with a defined portion of the family property as if it were his own, it may be equitable to allot such portion to the purchaser if possible.[5] Where he has dealt with a share in a defined portion, it may be equitable on partition to allot him a share in such portion. If such course be not equitable or practicable, the alienee would only have a right of compensation against the alienor personally.[6]

Where a coparcener has, by arrangement or without objection, occupied a particular portion of the family property, or where he has laid out his separate money on a certain portion of the property, it may be equitable to allot to him the portion occupied, or improved by him, provided that he does not thereby get more than his share.

In one case,[7] where a coparcener built with his separate money a house upon ground belonging to the family, the Court held that each of the coparceners was entitled to a share in the house and the site upon which it was built, equal in value to his share of the site.

How partition made by Court.

When the property is partible and capable of partition, the Court will ordinarily order a partition by metes and bounds.

Partition Act, 1893.

The following provisions of the Partition Act, 1893,[8] apply to all partitions by the Court, but do not affect any local law providing for the partition of immovable property paying revenue to Government.

Power to Court to

Sec.*2. Whenever in any suit for partition in which, if instituted prior

their prospective thread, betrothal, and marriage ceremonies, such sum to be calculated according to the extent of the family property: *Jairam* v. *Nathu* (1906), 31 Bom. 54; 8 Bom. L. R. 632.

[1] *Narayana* v. *Ramalinga* (1915), 39 Mad. 587, differing from *Srinivasa Iyengar* v. *Thiruvengadathaiyangar* (1914), 38 Mad. 556.

[2] *Anantanarayana Iyer* v. *Savithri Ammal* (1911), 36 Mad. 151.

[3] *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1876), 1 Bom. 561. See *ante*, p. 254.

[4] *Ibid.*; *Konerrav* v. *Gurrav* (1881), 5 Bom. 589, at p. 595.

[5] *Pandurang Anandrav* v. *Bhaskar Shadashiv* (1874), 11 Bom. H. C. 72; *Udaram Sitaram* v. *Ranu Panduji* (1875), 11 Bom. H. C. 76; *Narayan* v. *Gumnaji* (1903), 5 Bom. L. R. 945.

[6] *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (1902), 25 Mad. 690, at pp. 718, 719.

[7] *Vithoba Bava* v. *Hariba Bava* (1869), 6 Bom. H. C. A. C. 54.

[8] Act IV, of 1893.

to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.[1] order sale instead of division in partition suits.

Sec. 3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf. Procedure when sharer undertakes to buy.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Sec. 4. (1) Where a share of a dwelling-house belonging to an undivided family [2] has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf. Partition suit by transferee of share in dwelling-house.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking, or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability. Representation of parties under disability.

6. (1) Every sale under section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time. Reserved bidding and bidding of shareholders.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

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[1] *Hirakore* (*Bai*) v. *Trikamdas* (1907), 4 Bom. 103.

[2] Ownership, not occupation, gives the right, *Vaman Vishnu Gokhale* v. *Vasudev Morbhat Kale* (1898), 23 Bom. 73.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

Procedure to be followed in case of sales.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon,[1] the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure [2] in respect of sales in execution of decrees.

8. Any order for sale made by the Court under section 2, 3, or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure.[2]

Saving of power to order partly partition and partly sale.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

Application Act to pending suits.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the Court.

Partition of revenue-paying estate.

A Civil Court can make a decree for a partition of an estate paying revenue to Government, but cannot carry out his decree,[3] unless no separate allotment of the revenue be asked for.[4] If the decree be for the partition, or for the separate possession of a share of an undivided estate assessed as such to the payment of undivided revenue to Government,[5] the partition of the estate or the separation of the share shall be made by the Collector according to the law, if any, for the time being in force for the partition, or the separate possession of such estate.[6]

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[1] This now would be the Chief Court of Lower Burmah in the exercise of its original civil jurisdiction. See Act VI. of 1900.

[2] Act V. of 1908.

[3] *Meherban Rawoot* v. *Behari Lal Barik* (1896), 23 Calc. 679; *Dattatraya Vithal* v. *Mahadaji Parashram* (1891), 16 Bom. 528; *Ramjoy Ghose* v. *Ramrunjun Chuckerbutti* (1881), 8 C. L. R. 367; *Parbhudas Lakhmidas* v. *Shankarbhai* (1886), 11 Bom. 662; *Chundernath Nundi* v. *Hur Narain Deb* (1881), 7 Calc. 153.

[4] *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1897), 24 Calc. 725; 1 C. W. N. 374.

[5] This does not include a ryotwari estate in Madras, *Muttuchidambara* v. *Karuppa* (1884), 7 Mad. 382, or a share of a certain defined portion of a mahal, *Ram Dayal* v. *Megu Lal* (1884), 6 All. 452.

[6] Civil Procedure Code (Act V. of 1908), s. 54.

No Civil Court, except the Bombay High Court, can entertain a suit or an application for the partition of a Gujarat taluqdari estate.[1]

Partition by Revenue authorities.

The law relating to the partition of revenue-paying estates is to be found in the following enactments:—

For Ajmere.—Reg. II. of 1877.

For Bengal.—Regulations VIII. of 1793, XVIII. of 1812, and VII. of 1822; Act V. (Ben. C.) of 1897.[2]

For Madras.—Mad. Reg. II. of 1803; Act II. of 1884.

For Assam.—Reg. I. of 1886, ss. 96–121, 154.

For Bombay.—Act X. of 1876; Act V. (Bom. C.) of 1879, ss. 113, 114; Act VI. (Bom. C.) of 1888.

For the Central Provinces.—Act XVIII. of 1881, s. 136, as amended by Act XVI. of 1889, s. 26.

For the United Provinces.—Act III. (N. W. P. C.) of 1901, ss. 105–140, 203.[3]

For the Punjab.—Act XVII. of 1887, ss. 112–135, 158.

For Coorg.—Reg. I. of 1899.

Effect of partition.

Partition does not annul the filial relation nor, subject to the preference of an undivided son,[4] or brother,[5] the right of inheritance incidental to such relation.[6]

REUNION.

Reunion.

The parties to a partition,[7] or some of them,[8] may reunite so as to constitute, after such reunion, a joint family, and to remit them to the same status as before the partition.[9]

The question as to whether there has been a reunion is a question of fact.[10]

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[1] Act VI. (Bo. C.) of 1888, s. 21.

[2] See *Tajamal Ali* v. *Mussud Ali* (1910), 14 C. W. N. 632.

[3] See *Jagan Nath* v. *Tirbeni Sahi* (1908), 31 All. 41.

[4] *Post*, p. 381.

[5] *Post*, p. 391.

[6] *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348; *Ramappa Naicken* v. *Sithammal* (1879), 2 Mad. 182.

[7] *Balabux Ladhuram* v. *Rukhmabai* (1903), 30 I. A. 130, at p. 136; 30 Calc. 725, at p. 734; 7 C. W. N. 642, at p. 646; 5 Bom. L. R. 469; *Pran Kishen Paul Chowdry* v. *Mothooramohun Paul Chowdry* (1865), 10 M. I. A. 403; 4 W. R. P. C. 11; *Vishvanath Gangadhar* v. *Krishnaji Gangadhar* (1866), 3 Bom. H. C. A. C. 69. See *Lakshmibai* v. *Ganpat Moroba* (1867), 4 Bom. H. C. O. C. 150, at pp. 165, 166. Persons who have never been joint cannot "reunite," *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (1908), 35 Calc. 721; 12 C. W. N. 511.

[8] See *Abhai Churn Jana* v. *Mangal Jana* (1892), 19 Calc. 634; *Tara Chand Ghose* v. *Pudum Lochun Ghose* (1866), 5 W. R. C. R. 249.

[9] They will succeed by survivorship, *Narasimha Charlu* v. *Venkata Singaramma* (1909), 33 Mad. 165. See, however, Mayne's "Hindu Law," 8th ed., pp. 824–826. As to the law of inheritance, see *post*, pp. 414, 415.

[10] *Raghubir Singh* v. *Motikunwar* (1912), 35 All. 41; 17 C. W. N. 443; 15 Bom. L. R. 426.

There must be a complete junction of estate with an intention to reunite, and not a mere living together,[1] or joint enjoyment of the property.[2]

Where any of their descendants think fit to unite, they may do so; but such a union is not a reunion in the sense of the Hindu law, and does not affect the inheritance.[3]

According to the Mitakshara,[4] reunion is restricted to three classes of cases, namely, (1) between father and son, (2) between brothers, (3) between paternal uncle and nephews.[5] The same view is taken in the Smriti Chandrika,[6] the Dayabhaga,[7] the Viramitrodaya,[8] and the Mayukha.[9] The Mithila school permits any of the late co-sharers to reunite.[10]

An agreement to reunite cannot apparently be made by, or on behalf of, a minor.[11]

The burden of proof of reunion is on the person alleging it.[12]

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[1] *Rusi Mendli* v. *Sundar Mendli* (1910), 37 Calc. 703; *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1867), 7 W. R. C. R. 35; *Kuta Bully Viraya* v. *Kuta Chudappavuthamulu* (1864), 2 Mad. H. C. 235.

[2] See *Balkishen Das* v. *Ramnarain Sahu* (1903), 30 I. A. 139; 30 Calc. 738; 7 C. W. N. 578; 5 Bom. L. R. 461.

[3] *Vishvanath Gangadhar* v. *Krishnaji Gangadhar* (1866), 3 Bom. H. C. A. C. 69. See *Krodesh Sen* v. *Kamini Mohun Sen* (1881), 10 C. L. R. 161; *Ram Hari Sarma* v. *Trihi Ram Sarma* (1871), 7 B. L. R. 336; 15 W. R. C. R. 442.

[4] Chap. ii. s. 9, paras. 2, 3.

[5] *Basanta Kumar Singha* v. *Jogendra Nath Singha* (1905), 33 Calc. 371; 10 C. W. N. 236.

[6] Chap. xii. para. 1. *Abhai Churn Jana* v. *Mangal Jana* (1892), 19 Calc. 634, at p. 638.

[7] Chap. xii. paras. 3, 4. See also "Daya-Krama-Sangraha," chap. v. para. 4.

[8] G. C. Sarkar's translation, pp. 168, 169, 205.

[9] Chap. iv. s. 19, para. 1.

[10] "Vivada Chintamani" (P. C. Tagore's translation), p. 301; "Daya-Krama-Sangraha," chap. v. para. 5.

[11] *Balabux Ladhuram* v. *Rukmabai* (1903), 30 I. A. 130, at p. 136; 30 Calc. 725, at pp. 734, 735; 7 C. W. N. 642, at p. 646; 5 Bom. L. R. 469.

[12] *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1867), 7 W. R. C. R. 35.

CHAPTER X.

PRINCIPLES OF INHERITANCE.

THE Law of Inheritance is the law as to the devolution of property on the death of an absolute owner intestate. Definition.

There is old authority that when a Hindu relinquishes all worldly affairs, his heir takes his property.[1] In the event of such a question arising it would have to be shown clearly that there was a formal and conclusive abandonment of all interests in property. Abandonment of worldly affairs.

Under the Bengal school of law all the property of which a Hindu dies possessed, whether it be separate or coparcenary, passes to his heir, if he has made no valid bequest thereof.[2] To what property inheritance applies.

Under the Mitakshara law the heir is entitled only to—

(*a*) The separate acquisitions of a deceased member of a coparcenary.[3]

(*b*) Property which had belonged to a coparcenary of which the deceased was the sole surviving member.[4]

(*c*) The property, however acquired, of a deceased Hindu, who was at the time of his death separate from the other members of his family.[5]

No question of inheritance to coparcenary property governed by the

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[1] Strange's "Hindu Law," vol. ii. p. 185; Colebrooke's "Digest," vol. ii. pp. 525, 536; "Daya-Bhaga," chap. ii. para. 57. See *Hafzoonnissa Begum* v. *Radhabinode Missur*, Ben. S. D. A. 1856, p. 595; *Sidh Naraen* v. *Futeh Naraen* (1805), 1 Ben. Sel. R. 118 (new edition, 156); *Jagannath Pal* v. *Bidyanand* (1868), 1 B. L. R. 114; 10 W. R. C. R. 172; *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (1898), 22 Mad. 302; *Harish Chandra Roy* v. *Atir Mahmud* (1913), 40 Calc. 545.

[2] *Durga Nath Pramanik* v. *Chintamoni Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11.

[3] *Katama Natchiar* v. *The Rajah of Shivagunga* (1864), 9 M. I. A. 543; 2 W. R. P. C. 31; *Periasami* v. *Periasami* (1878), 5 I. A. 61; 1 Mad. 312; 2 C. L. R. 81; *Pitum Koonwar* (*Musst.*) v. *Joy Kishen Doss* (1866), 6 W. R. C. R. 101.

[4] *Ante*, pp. 219, 220.

[5] *Doorga Persad Singh* (*Tekait*) v. *Doorga Konwari* (*Tekaitni*) (1878), 5 I. A. 149, at p. 160; 4 Calc. 190, at p. 202; 3 C. L. R. 31, at p. 40; *Soorjoon* (*Musumat*) v. *Ishree Brahmun* (1871), 3 N. W. P. 74.

Mitakshara school of law can arise when there is a surviving coparcener, however remotely connected with the deceased.[1]

As to the devolution of coparcenary property, see *ante*, pp. 236, 237.

As to the devolution of the separate property of a member of a *tarwad*, see *Govindan Nair* v. *Sankaran Nair* (1909), 32 Mad. 351.

As to the devolution of property which by grant or custom passes to a single heir, see *post*, Chap. XVII.

As to the devolution of *mata* property, see Bombay Matadars Act (VI. (Bom. C.) of 1887), ss. 9, 10; *Daya Khushal* v. *Bhikhi* (*Bai*) (1915), 17 Bom. L. R. 504.

Property vested in deceased.

In the absence of a valid bequest an heir is entitled to succeed to all property, which was vested in the deceased in title or in possession at the time of his death, although the enjoyment of the deceased therein may have been postponed.[2]

He is not entitled to succeed to property which was not so vested.[3]

Vesting of inheritance.

The right of the nearest heir to inherit vests at the moment of the death of the owner of the property, or of a female heir taking a restricted estate.[4] It cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death.[5]

The question in each case is who is the nearest heir when the succession opens out, *i.e.* on the death of the propositus or on the death of a woman who does not make a fresh stock of descent.

A person who is born between the date of the death of a full owner and the death of a female limited owner will take if he is at the latter date the nearest heir of the last full owner.[6]

It is not obligatory on a Hindu heir to obtain letters of administration to the estate of the last owner.[7]

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[1] *Ante*, pp. 236, 237.

[2] *Rewun Persad* v. *Radha Beeby* (*Mussumat*) (1846), 4 M. I. A. 137, at p. 176; 7 W. R. P. C. 35, at p. 40; *Hurrosoondery Debea Chowdranee* v. *Rajessurre Dabea* (1865), 2 W. R. C. R. 321.

[3] *Balamma* v. *Pullayya* (1894), 18 Mad. 168.

[4] *Post*, Chap. XV.

[5] *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (1881), 7 Calc. 178, at p. 188; 8 C. L. R. 401, at p. 404; *Behari Lal Laha* v. *Kailas Chunder Laha* (1896), 1 C. W. N. 121; *Amrito Lall Dutt* v. *Surnomoni Dasi* (1898), 25 Calc. 662, at pp. 690, 691; 2 C. W. N. 389, at p. 396; *Koylasnath Doss* v. *Gyamonee Dossee*, W. R. 1864, C. R. 314; *Rash Beharee Roy* v. *Nimaye Churn*, *Ibid.* 223; *Kesub Chunder Ghose* v. *Bishnopursaud Bose*, Ben. S. D. A. 1860, vol. ii. 340; *Gordhandas* v. *Ramcoover* (*Bai*) (1901), 26 Bom. 449; 3 Bom. L. R. 857; *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1833), 5 Ben. Sel. R. 315 (new edition), 369; *Banymodht Ghose* v. *Juggodumba Dossee*, 2 Sev. App. C. 248; Norton L. C. 421.

[6] *Seeta Ram Gossain* v. *Fukeer Chand Chuckerbutty* (1871), 15 W. R. C. R. 433.

[7] *Jogendra Chunder Dutt* v. *Apurna Dassi* (1908), 13 C. W. N. 1190; *Saboo Sidick* (*Haji*) v. *Ally Mahomed* (1904), 30 Bom. 270; 6 Bom. L. R. 1135.

The right can only be devested by the valid adoption of a son to the late owner,[1] or by the birth of a child who was conceived at the time of his death[2] (or when the succession opened out),[3] and would have had a preferential right to the inheritance.[4]

Devesting of inheritance.

There might also be a case where a testator had made a bequest to operate *in futuro*; then the estate of the heir would be devested on the bequest coming into operation.[5]

An estate once vested cannot be devested by the birth of a nearer heir, who was not conceived at the time the succession opened out, nor can it be partially devested by the birth of a person who would have been a co-heir if he had been born at the time when the inheritance vested.[6]

Illustration.

A Hindu died in 1832 leaving an only son who had been blind from his birth, and two widows the survivor of whom died in 1849. On the death of the surviving widow, a nephew succeeded as heir, the blind son being by Hindu law excluded from inheritance.[7] The blind man, having married, a son was born to him in 1858. The blind man died in 1861. His son did not oust the nephew.[8]

An heir succeeds by virtue of his own right as the nearest heir, that is to say, by his own propinquity, or capacity to offer oblations as the case may be. He does not acquire his right through or under any other person.[9]

Right not acquired through others.

A person does not take because he was heir of a person who would have taken if he had survived the deceased.

"Heritable blood is a foreign importation from a foreign law, and

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[1] See *ante*, pp. 193, 198.

[2] *Berogah Moye* (*Mt.*) v. *Nubokissen Roy*, 2 Sev. App. C. 239; Norton L. C. 422. This has no application to the case of a still-born child, *Goura Chowdhrain* (*Mussamut*) v. *Chummun Chowdry*, W. R. 1864, C R. 340, at p. 342.

[3] *Rash Beharee Roy* v. *Nimaye Churn*, W. R. (1864), C. R. 223.

[4] Cases *ante*, p. 362, note 5, and *post*, p. 373, note 7. *Aulim Chund Dhur* v. *Bejai Govind Burrall* (1838), 6 Ben. Sel. R. 224 (new ed., 278); *Bama Soonduree Dossee* v. *Anund Moyee Dossee* (1864), 1 W. R. C. R. 353; *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103; 11 W. R. A. O. J. 11; cf. *Minakshi* v. *Virappa* (1884), 8 Mad. 89; *Yekeyamian* v. *Agniswarian* (1869), 4 Mad. H. C. 307, at p. 311; *Hanmant Ramchandra* v. *Bhimacharya* (1887), 12 Bom. 105; *Goura Chowdhrain* (*Mussamut*) v. *Chummun Chowdry*, W. R. 1864, C. R. 340.

[5] See *Bramamayi Dasi* (*Srimuti*) v. *Jages Chandra Dutt* (1871), 8 B. L. R. 400, at p. 407.

[6] *Narasimha Razu* v. *Veerabhadra Razu* (1893), 17 Mad. 287.

[7] *Post*, pp. 370, 371.

[8] *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103; 11 W. R. A. O. J. 11; and see other cases, *post*, p. 374.

[9] See *Brojo Mohun Thakoor* v. *Gouree Pershad Chowdhry* (1871), 15 W. R. C. R. 70; *Balamma* v. *Pullaya* (1894), 18 Mad. 168, at p. 170.

grafting it upon the Hindu system can only lead to further confusion and inconsistency." [1]

An heir is not disqualified because the person through whom he is related to the deceased cannot take. Thus a sister's son succeeds [2] although a sister cannot succeed. The same observations apply in the case of a mother's sister, a mother's father's sister, a brother's daughter, a father's brother's daughter, a father's sister, a father's father's brother's daughter, and a father's father's sister. If the sons of these persons predecease the owner, their sons, not being heirs, cannot take under the Bengal school. Again, the son of a disqualified person may inherit by virtue of his own heirship,[3] although his father could not have taken.[4]

Illustrations.

(*a*) A son dies before his father, leaving a daughter. The daughter cannot succeed to her grandfather, although if her father had survived her grandfather, she would have inherited the property.[5]

(*b*) A niece does not take the property of her uncle, although her father, if he had been alive, would have inherited.

Thus, except in some cases in the Bombay Presidency,[6] a widow cannot, as such, inherit the property of any person other than her husband, *i.e.* no right accrues to her as widow to succeed to a person to whom her husband would have been an heir if he had lived.

The widow of a son,[7] of a son's son,[8] of a daughter's son,[9] of a father,[10] of a brother,[11] of an uncle,[12] or of a cousin,[13] has no right of inheritance as such.

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[1] *Chelikani Tirupati Rayaningaru* v. *Suraneni Vencata Gopala Narasimha Rau Bahadur* (*Rajah*) (1871), 6 Mad. H. C. 278, at p. 287.

[2] *Post*, pp. 402, 428.

[3] *Post*, p. 373.

[4] *Post*, pp. 370, 371.

[5] Macnaghten's "Hindu Law," vol. ii. p. 176.

[6] *Post*, pp. 412, 413.

[7] *Ananda Bibee* v. *Nownit Lal* (1882), 9 Calc. 315; *Amrit* (*Bai*) v. *Manik* (*Bai*) (1875), 12 Bom. H. C. 79; *Himulta Chowdrayn* (*Mussummaut*) v. *Pudoo Munee Chowdrayn* (*Mussummaut*) (1825), 4 Ben. Sel. R. 19 (new edition, 25); *Rai Sham Bullubh* v. *Prankishen Ghose* (1820), 3 Ben. Sel. R. 35 (new edition, 44); *Ayabutee* (*Mussummaut*) v. *Rajkishen Sahoo* (1820), *Ibid.* 28 (new edition, 38); Strange's "Hindu Law," vol. ii. pp. 233, 234.

[8] *Goornee* (*Mussumat*) v. *Oomrao Koonwer* (*Mussumat*) (1866), 1 Agra H. C. 149.

[9] W. Macnaghten's "Hindu Law," vol. ii. p. 47.

[10] *Seethai* v. *Nachiar* (1912), 37 Mad. 286; *Ramkoonwur* v. *Ummur* (1817), 1 Borr. 415; *Bhyrobee Dossee* v. *Nubkissen Bhose* (1836), 6 Ben. Sel. R. 53 (new edition, 61).

[11] *Thayammal* v. *Annamalai Mudali* (1895), 19 Mad. 35; *Peddamuttu Viramani* v. *Appu Rau* (1864), 2 Mad. H. C. 117; *Jogdamba Koer* v. *Secretary of State* (1889), 16 Calc. 367; *Choora* v. *Busuntee* (*Mussumat*) (1866), 1 Agra H. C. 174; *Jymunee Dibiah* (*Mussummaut*) v. *Ramjoy Chowdree* (1824), 3 Ben. Sel. R. 289 (2nd ed., 385).

[12] *Gauri Sahai* v. *Rukko* (1880), 3 All. 45; *Upendra Mohan Tagore* v. *Thanda Dasi* (1869), 3 B. L. R. A. C. 349; 12 W. R. C. R. 263.

[13] *Soorendronath Roy* v. *Heeramonee Burmoneah* (*Mussamut*) (1868), 12 M. I. A. 81; 1 B. L. R. P. C. 26; 10 W. R. P. C. 35

Disinherison.

An heir cannot be excluded by a testator from inheritance otherwise than by a valid devise to some other person.[1]

Alteration of course of inheritance.

The course of inheritance prescribed by the Hindu law cannot be altered by a private arrangement,[2] or by will,[3] but there is nothing to prevent persons, in whom interests have become vested by inheritance, making arrangements *inter se* as to their shares, or waiving their rights.[4]

Heir becomes fresh stock of descent.

On property descending to a male Hindu as heir, he becomes a fresh stock of descent, and on his death the property passes to his heir and not to the heir of the previous owner.

When property descends to a female, she does not,[5] except in some cases in Bombay,[6] become a new stock of descent, but on her death the person, who would have been heir to the last full owner if he or she had been living at the death of the female, takes, and, if a male, becomes a new stock of descent.

Nearer heir excludes more remote.

Except in the case of the inheritance of a son, of a son's son, or of a son's son's son to the property of a male Hindu,[7] in which case the doctrine of representation excludes the rule of preference,[8] the existence of a class of nearer heirs excludes all members of a more remote class.[9]

For example, a brother's son cannot succeed while there is in existence a brother capable of taking.[10]

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[1] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Supp. vol. 47, at p. 79; 3 B. L. R. 377, at pp. 409, 410; 18 W. R. C. P. 359, at p. 371; *Toolseydas Ludha* v. *Premji Tricumdas* (1888), 13 Bom. 61, at p. 69.

[2] *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54; *Venkata Mahapati Surya Rao Bahadur (Sri Raja Rao)* v. *Venkata Mahapati Gangadhara Rama Rao Bahadur (Hon. Sri Raja Rao)* (1886), 13 I. A. 97; 9 Mad. 499.

[3] *Juttendromohun Tagore* v. *Gamendromohun Tagore* (1872), I. A. Supp. vol. 47, at pp. 64, 65; 9 B. L. R. 377, at p. 394; 18 W. R. C. R. 359, at p. 364; *Tarakeswar Roy (Kumar)* v. *Shoshi Shikareswar (Kumar)* (1883), 10 I. A. 51, at p. 58; 9 Calc. 952, at p. 958; 13 C. L. R. 62, at pp. 65, 66.

[4] *Meherban Singh* v. *Sheo Koonwer (Mussumat)* (1866), 1 Agra, 106; *Dal Chund* v. *Soonder (Mussumat)* (1867), 2 Agra, 173.

[5] *Post*, p. 464.

[6] *Post*, p. 467.

[7] *Post*, pp. 381, 382. As to illegitimate sons, see *post*, pp. 382, 383. As to *stridhan* property, see *post*, p. 449.

[8] *Muttuvaduganatha Tevar* v. *Periasami* (1892), 16 Mad. 11, at p. 15; *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348, at p. 351.

[9] *Chandika Bakhsh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 6 C. W. N. 425; 4 Bom. L. R. 376; *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115; *Mahabeer Pershad* v. *Ram Surun* (1866), 3 Agra, 6; *Khettur Gopal Chatterjee* v. *Poorno Chunder Chatterjee* (1871), 15 W. R. C. R. 482.

[10] *Rooder Chunder Choudhry* v.

The Hindu treatises on the law of inheritance among sons and grandsons proceed on the assumption of a partition made immediately after the death of the "propositus." [1]

Rights of women.

The rights of women to inherit property are on a different footing from that of males.

Under the Bengal,[2] Benares,[3] and Madras [4] schools, women inherit only by virtue of express texts, but in Madras certain female heirs are entitled to succeed in default of all male heirs.[5]

The Crown succeeds by escheat in preference to a woman who is not so named.[6]

Although women may not be heirs, their sons may be heirs on their own merits and not through their mothers.[7] Thus the sister's son,[8] the son of an uncle's daughter, the son of a brother's daughter, the son of a nephew's daughter, a son's daughter's son,[9] or a daughter's daughter's son,[10] are heirs, although their mothers are not heirs.

In the Bombay Presidency widows of male relatives and certain female relatives, who are excluded in the other Presidencies, are entitled to inherit.[11]

Sumbhoo Chunder Chowdhry (1821), 3 Ben. Sel. R. 106 (new edition, 142); *Jymunee Dibiah* (*Mussummaut*) v. *Ramjoy Chowdree* (1824), *Ibid.* 289 (new edition, 385); *Prithee Singh* v. *Court of Wards* (1875), 23 W. R. C. R. 272; S. C. on appeal, *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147.

1 West and Bühler, 3rd ed., 68; *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348, at p. 350.

2 *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212, at p. 231; 5 Bom. 110, at p. 118; S. C. in Court below, *Lallubhai Bapubhai* v. *Mankuvarbhai* (1876), 2 Bom. 388, at pp. 418, 428, 438; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 37; 13 W. R. F. B. R. 49, at p. 58; *Madhumala Dassi* (*Srimati*) v. *Lakshan Chandra Pal* (1913), 20 C. W. N. 627; "Daya-Bhaga," chap. xi. s. vi. para. 11.

3 *Nanhi* v. *Gauri Shankar* (1905), 28 All. 187; *Jagannath* v. *Champa* (1905), 28 All. 307, dissenting from *Bansidhar* v. *Ganeshi* (1900), 22 All. 338; *Gauri Sahai* v. *Rukko* (1880), 3 All. 45; *Jagatnarain* v. *Sheo Das* (1883), 5 All. 311; see *Ananda Bibee* v. *Nownit Lal* (1882), 9 Calc. 315.

4 *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212, at p. 231; 5 Bom. 110, at p. 118; S. C. in Court below, *Lallubhai Bapubhai* v. *Mankuvarbhai* (1876), 2 Bom. 388, at pp. 418, 428, 438; *Mari* v. *Chinnammal* (1884), 8 Mad. 107, at pp. 117, 127, 129. See *Lakshmanammal* v. *Tiruvengada* (1882), 5 Mad. 241, at p. 249.

5 *Post*, pp. 413, 414.

6 *Jogdamba Koer* v. *Secretary of State* (1889), 16 Calc. 367; see *post*, p. 416.

7 See *ante*, p. 363.

8 *Post*, p. 402. See *Chelikani Tirupati Rayaningaru* v. *Vencata Gopala Narasimha Rau Bahadur* (*Rajah Suraneni*) (1871), 6 Mad. H. C. 278, at p. 288.

9 *Nanhi* v. *Gauri Shankar* (1905), 28 All. 187; *Koomud Chunder Roy* v. *Seetakanth Roy*, W. R. F. B. R. 75.

10 *Jagannath* v. *Champa* (1905), 28 All. 307.

11 *Post*, pp. 412, 413.

"The principle of the general incapacity of women for inheritance . . . has not been adopted in Western India, where, for example, sisters are competent to inherit." [1]

Succession after female.

Except in certain cases in the Bombay Presidency,[2] on the death of a female in whom the inheritance has vested, the then next heir to the last full owner takes the estate, *i.e.* the property descends to those who would have been the heirs of the last full owner if he (or she in the case of *stridhan*) had lived up to and died at the moment of the death of such female owner.[3]

As to the estate taken by a female in inherited property and her power over such property, see *post*, Chap. XV.

Succession when *per stirpes.*

In the case of the male agnate descendants of a deceased male Hindu,[4] and in the case of the succession of the sons of daughters in cases governed by the "Mayukha," [5] and in the distribution of *stridhan* property among sons' sons and among daughters' sons,[6] the heirs take *per stirpes.*

Succession when *per capita.*

In other cases persons of the same relationship to the deceased take *per capita, i.e.* each sharer takes an equal share independently of the stock from which he came.

This follows from the rule that there is no representation in inheritance.[7] Thus brothers' sons [8] and daughters' sons [9] succeed *per capita.*

"There is no positive reason in favour of applying the rule of succession *per stirpes* to the case of the remote *gotraja sapindas,* while there are certain important considerations pointing the other way. . . . As

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[1] *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212, at p. 231; 5 Bom. 110, at p. 118.

[2] *Post*, p. 467.

[3] *Post*, p. 464.

[4] "Mitakshara," chap. i. s. v. paras. 1, 2; "Daya-Bhaga," chap. iii. s. i. para. 21; "Smriti Chandrika," chap. viii. paras. 1, 2.

[5] "Vyavahara Mayukha," chap. iv. s. x. para. 20.

[6] "Mitakshara," chap. ii. s. xii. para. 16; "Vyavahara Mayukha," chap. iv. s. x. para. 21; "Smriti Chandrika," chap. ix. s. iii. para. 25; Banerjee's "Law of Marriage," 3rd ed., p. 402.

[7] *Ante*, p. 363.

[8] *Brojo Kishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463; *Brojo Mohun Thakoor* v. *Gouree Pershad Chowdhry* (1871), 15 W. R. C. R. 70; *Gooroo Churn Sircar* v. *Koylash Chunder Sircar* (1866), 6 W. R. C. R. 93; *Rutton Kristo Bosoo* v. *Bhugoban Chunder Bosoo* (1872), 18 W. R. C. R. 32; R. K. Sarvadhikari's "Hindu Law of Inheritance," p. 483.

[9] (Mitakshara School) *Nagesh* v. *Gururao* (1892), 17 Bom. 303; *Ram Swaruth Pandey* v. *Basdeo Singh* (*Baboo*) (1867), 2 Agra, 168; *Sheo Sehai Singh* v. *Omed Konwur* (*Mussummat*) (1840), 6 Ben. Sel. R. 301 (2nd ed., 378). (Bengal School) *Ramdhun Sein* v. *Kishen Kanth Sein* (1821), 3 Ben. Sel. R. 100 (new edition, 133).

regards daughters' sons, it has always been held that they succeed not *per stirpes* but *per capita*. . . . So in the case of brothers' sons the same rule has been laid down. In both cases the succession is direct, the nephews being entitled to claim as nephews, and being liable to be excluded by any uncle or aunt, as the case may be, if one happens to survive the propositus. The similarity between the succession of these nephews with that of the remoter *gotraja sapindas* is more complete than that between the succession of the latter, and that of lineal descendants." [1]

Relinquishment of heirship.

There is apparently no objection to an heir, either under the Mitakshara [2] or the Bengal law,[3] relinquishing his rights of inheritance in favour of the next heir.

This applies also to the case of an impartible Raj.[4]

Exclusion from Inheritance.

Unchaste widow.

An unchaste widow is not entitled to succeed to the property of her husband,[5] but where before the loss of chastity the property has vested in her,[6] although she may not have acquired possession thereof,[7] her rights therein are not devested by the subsequent loss of chastity.

Unchastity which has been condoned by the husband is not a bar.[8]

Other unchaste heirs.

In parts of India governed by the Mitakshara law a widow is the only female heir, at any rate in Bombay and Madras, who is excluded by unchastity from inheritance to a male Hindu.[9]

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[1] *Nagesh* v. *Gururao* (1892), 17 Bom. 303; *Ramgutty Doss* v. *Nundo Koomar Doss* (1865), 2 W. R. C. R. 11. "Partition is equal in the absence of special texts to the contrary," Bhattacharya's "Hindu Law," 2nd ed., p. 442.

[2] "Mitakshara," chap. i. s. ii. para. 11; *Ruvee Bhudr Sheo Bhudr* v. *Roopshunkur Shunkerjee* (1823), 2 Borr. 656, at p. 665. See *Meherban Singh* v. *Sheo Koonwer (Mussumat)* (1866), 1 Agra, 106; *ante*, p. 230.

[3] *Rujoneekant Mitter* v. *Premchand Bose* (1862), Marsh, 241. See *Ram Kannye Gossamee* v. *Meernomoyee Dossee* (1865), 2 W. R. C. R. 49.

[4] *Luchmeenarain Singh* v. *Gibbon* (1870), 14 W. R. C. R. 197.

[5] "Mitakshara," chap. ii. s. i. paras. 37–39, s. ii. para. 2; *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at pp. 11, 12; 19 W. R. C. R. 367, at p. 371; "Vyavahara Mayukha," chap. iv. s. viii. paras. 2, 6, 8, 9; "Daya-Bhaga," chap. xi. s. i. para. 56. See *Rajkoonwaree Dassee* v. *Golabee Dassee*, Ben. S. D. A. 1858, p. 1891. As to her right of maintenance, see *ante*, p. 83.

[6] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115; 5 Calc. 776; 6 C. L. R. 322; S. C. (in court below) (1873), 13 B. L. R. 1; 19 W. R. C. R. 367; *Parvati* v. *Bhiku* (1867), 4 Bom. H. C. A. C. 25; *Nehalo* v. *Kishen Lal* (1879), 2 All. 150; *Sellam* v. *Chinnammal* (1901), 24 Mad. 441.

[7] *Bhawani* v. *Mahtab Kuar* (1879), 2 All. 171.

[8] *Gangadhar* v. *Yellu* (1911), 36 Bom. 138; 13 Bom. L. R. 1038.

[9] (As to daughter) *Tara* v. *Krishna* (1907), 31 Bom. 495, at p. 502; 9 Bom. L. R. 774; *Advyapa* v. *Rudrava*

The "Smrita Chandrika,"[1] which is of great authority in Madras,[2] and the "Viramitrodaya,"[3] which is of authority in the Benares school,[4] make chastity a condition for inheritance, but the "Mitakshara" and the "Mayukha" omit to impose upon a daughter the condition of being chaste.[5] The law is thus clear in Bombay, and in Madras the question is covered by the decision in *Kojiyadu* v. *Lakshmi*.[6] There is no authority elsewhere, but it is submitted that the omission of this condition from the "Mitakshara" decides the question.

According to the Bengal school, in addition to the widow any other female heir to a male is excluded by her unchastity[7] antecedent to the vesting.

Stridhan.

Unchastity is not a bar to inheriting *stridhan* property.[8]

"The only disqualification for a widow to inherit her husband's estate is that one of physical unchastity."[9]

Forfeiture of property by remarriage.

Act XV. of 1856, which empowers Hindu widows to remarry, provides as follows :—

Sec. 2. "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors,[10] or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall, upon her remarriage, cease and determine, as if

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(1879), 4 Bom. 104; *Kojiyadu* v. *Lakshmi* (1882), 5 Mad. 149, at p. 155; *Vedammal* v. *Vedanayaga Mudaliar* (1907), 31 Mad. 100; *Angammal* v. *Venkata Reddy* (1902), 26 Mad. 509, at p. 511; *Ganga Jati (Musammat)* v. *Ghasita* (1875), 1 All. 46; *Deokee (Mussumat)* v. *Sookhdeo* (1870), 2 N. W. P. 361. (As to a mother) *Dal Singh* v. *Dini (Musammat)* (1909), 32 All. 155; *Kojiyadu* v. *Lakshmi* (1882), 5 Mad. 149; *Baldeo Singh* v. *Mathura Kunwar* (1911), 33 All. 702.

[1] Chap. xi. s. ii. para. 26.

[2] *Ante*, p. 17.

[3] Chap. iii. pt. ii. s. 3.

[4] *Ante*, pp. 16, 17.

[5] See *Advyapa* v. *Rudrava* (1879), 4 Bom. 104, at pp. 110, 111.

[6] (1882), 5 Mad. 149.

[7] Raghanandan's commentary on "Daya-Bhaga," chap. xi. s. ii. para. 31, referred to in *Ramnath Tolapattro* v. *Durga Sundari Debi* (1878), 4 Calc. 550, at p. 554; *Sundari Letani* v. *Pitambari Letani* (1905), 32 Calc. 871; 9 C. W. N. 1003; *Ramananda* v. *Raikishori Barmani* (1894), 22 Calc. 347; *Ramnath Tolapattro* v. *Durga Sundari Debi* (1878), 4 Calc. 550; *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at p. 48; 19 W. R. C. R. 367, at p. 393.

[8] *Ganga Jati (Musammat)* v. *Ghasita* (1878), 1 All. 46; *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (1902), 30 Calc. 521; 7 C. W. N. 121; *Angammal* v. *Venkata Reddy* (1902), 26 Mad. 509. Sastri G. C. Sarkar disputes this ("Hindu Law," 3rd ed., p. 333).

[9] *Khettermoni Dassi (Sm.)* v. *Kadumbini Dassi (Sm.)* (1912), 16 C. W. N. 964, at p. 966.

[10] Thus she forfeits property inherited from a son; *Vithu* v. *Govinda* (1896), 22 Bom. 321.

she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

Remarriage of widow.

There is a conflict of authority as to whether this applies whether or not she has before such remarriage abandoned Hinduism. On the one hand it has been held that the Act only applies to widows who are professed Hindus at the time of remarriage.[1] On the other hand there is authority that a woman cannot by a change of religion retain the rights which she would otherwise have lost.[2] It is submitted that the latter view is correct.

A widow does not by remarriage lose her rights to succeed thereafter to her son or other lineal successor of her husband.[3]

There is a conflict of opinion as to whether widows, who are by the custom of their caste entitled to remarry, lose their interests in the property of their husbands by remarriage. The Allahabad High Court [4] considers that they do not, but the High Courts at Calcutta,[5] Madras,[6] and Bombay [7] have taken the opposite view.

She has the same rights of inheritance to her new husband as she would have had, had such marriage been her first marriage.[8]

Physical defects.

Certain physical defects exclude from inheritance and coparcenary,[9] viz. impotence,[10] idiocy,[11] congenital blindness,[12]

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[1] *Abdul Aziz Khan* v. *Nirma* (1913), 35 All. 366.

[2] *Matungini Gupta* v. *Ram Rutton Roy* (1891), 19 Calc. 289, overruling *Gopal Singh* v. *Dhungazee* (1865), 3 W. R. C. R. 206.

[3] *Akora Suth* v. *Boreani* (1868), 2 B. L. R. 199; 11 W. R. C. R. 82; *Basappa* v. *Rayava* (1904), 29 Bom. 91; 6 Bom. L. R. 779; *Haru Dulmel (Chamar)* v. *Kashi* (1902), 26 Bom. 388; 4 Bom. L. R. 737; *Lakshmana Sasamallo* v. *Siva Sasamallayani* (1905), 28 Mad. 425.

[4] *Khuddo* v. *Durga Prasad* (1906), 29 All. 122; *Har Saran Das* v. *Nandi* (1889), 11 All. 330; *Ranjit* v. *Radha Rani* (1898), 20 All. 476; *Gajadhar* v. *Kaunsilla* (1908), 31 All. 161. These decisions were accepted with hesitation in *Mula* v. *Partab* (1910), 32 All. 489.

[5] *Rasul Jehan Begum* v. *Ram Surun Singh* (1895), 22 Calc. 589; *Gourichurn Patni* v. *Sita Patni* (1909), 14 C. W. N. 346; *Mahammad Umbar* v. *Mankuar (Must.)* (1917), 21 C. W. N. 906.

[6] *Murugayi* v. *Viramakali* (1877), 1 Mad. 226.

[7] *Vithu* v. *Govinda* (1896), 22 Bom. 321.

[8] Act XV. of 1856, sec. 5.

[9] See *ante*, pp. 228, 229.

[10] "Daya-Bhaga," chap. v. paras. 7, 8; "Viramitrodaya," chap. viii. The "Mitakshara" (chap. ii. s. 10, para. 2) describes an impotent person as one of the third sex, but in "Bala-abhata" the authoress (Lakshmi Devi) includes a male eunuch, so, according to her, impotence need not be congenital. The "Viramitrodaya" takes a different view, but the "Mitakshara" (chap. ii. s. 10, para. 3) includes persons who have become impotent. "Manu," chap. ix. para. 201, excludes eunuchs, so apparently non-congenital impotence will be a ground of exclusion. Except in the cases of hermaphrodites and eunuchs, impotence, so as to exclude from inheritance, is very difficult to prove: see Bhattacharya's "Law of Joint Family," pp. 405, 406.

[11] *I.e.* of unsound and imbecile mind. See *Tirumamagal Ammal* v. *Ramasvami Ayyangar* (1863), 1 Mad. H. C. 214. The "Mitakshara" (chap. ii. s. 10, para. 2) defines an idiot as a "person deprived of the internal faculty; meaning one incapable of discriminating right from wrong."

[12] *Murarji Gokuldas* v. *Parvatibai*

deafness or dumbness,[1] absence of a limb or sense,[2] lameness, *i.e.* complete incapacity to walk,[3] lunacy,[4] although not congenital [5] or incurable.[6]

If the interest be vested by birth, it cannot be devested by subsequent lunacy [7]; nor can it be devested by lunacy commencing after the succession has opened out.[8]

The rule of Hindu law which disqualifies "idiots" and "madmen" from inheritance, should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied. The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endowed with the business capacity to manage their affairs properly.[9]

(1876), 1 Bom. 177. See *Bakubai* v. *Manchhabai* (1864), 2 Bom. H. C. 5. Blindness, even if incurable, is not, if it is not congenital, a ground of exclusion; *Umabai* v. *Bhavu Padmanji* (1877), 1 Bom. 557; *Mohesh Chunder Roy* v. *Chunder Mohun Roy* (1874), 14 B. L. R. 273; 23 W. R. C. R. 78; *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103; 11 W. R. A. O. J. 11. See Bhattacharya's "Law of the Joint Family," p. 419.

[1] *Muddun Gopal Lal* (*Lala*) v. *Khikinda Koer* (*Mussumat*) (1890), 18 I. A. 9; 18 Calc. 341; *Hira Sing* (*Chaudri*) v. *Gunga Sahai* (*Chaudhri*) (1883), 11 I. A. 20; 6 All. 322; *Vallabhram Shivnarayan* v. *Hariganga* (*Bai*) (1867), 4 Bom. H. C. A. C. 135; *Pareshmani Dasi* v. *Dinanath Das* (1868), 1 B. L. R. A. C. 117; 11 W. R. A. O. J. 19, note; *Balgovind Lall* v. *Rampertab Singh*, Ben. S. D. A. 1860, vol. i. p. 661.

[2] "Mitakshara," chap. ii. s. 10; "Daya-Bhaga," chap. v. s. 7. "Literally, an organ; explained by some as a sense, as that of smelling, or of sight, etc., but by others, a limb, as the hand, foot, and so forth." Colebrooke's annotation to "Daya-Bhaga," chap. v. para. 7.

[3] "Daya-Bhaga," chap. v. para. 10; Colebrooke's "Digest," vol. iii. p. 421. "There is no text which declares that lameness should be congenital," Bhattacharya's "Hindu Law," 2nd ed., p. 350, but in *Venkata Subba Rao* v. *Puroshottam* (1902), 26 Mad. 133, it was held that lameness which was not congenital did not exclude. See *Futtick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (1874), 22 W. R. C. R. 348; Sircar's "Vyavastha Darpana," 2nd ed., p. 1005.

[4] *Ram Soonder Roy* v. *Ram Sahye Bhugut* (1882), 8 Calc. 919.

[5] *Ram Sahye Bhukkut* v. *Laljee Sahye* (*Lalla*) (1881), 8 Calc. 149; 9 C. L. R. 457; *Dwarkanath Bysak* v. *Mahendranath Bysak* (1872), 9 B. L. R. 198; 18 W. R. C. R. 305; *Wooma Pershad Roy* v. *Grish Chunder Prochundo* (1884), 10 Calc. 639; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509. See *Bodhnarain Singh* (*Baboo*) v. *Omrao Singh* (*Baboo*) (1870), 13 M. I. A. 519; 6 B. L. R. 509; 15 W. R. P. C. 1; *Goureenath* v. *Collector of Monghyr* (1867), 7 W. R. C. R. 5; *Murarji Gokuldas* v. *Parvatibai* (1876), I Bom. 177, at p. 182.

[6] *Dwarkanath Bysak* v. *Mahendranath Bysak* (1872), 9 B. L. R. 198; 18 W. R. C. R. 305; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

[7] *Tirbeni Sahai* v. *Muhammad Umar* (1905), 28 All. 247; *Braja Bhukan Lal Ahusti* v. *Bichan Dobi* (1870), 9 B. L. R. 204, note; 14 W. R. C. R. 329; *Sanku* v. *Puttamma* (1890), 14 Mad. 289.

[8] *Dwarkanath Bysak* v. *Mahendranath Bysak* (1872), 9 B. L. R. 198; 18 W. R. C. R. 305; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

[9] *Surti* v. *Narain Das* (1890), 12 All. 530.

A physical defect, which would exclude a male from the inheritance, would also exclude a female.[1]

The ancient text-books also exclude persons suffering from an incurable disease.[2] Under modern authorities, persons suffering from the aggravated form of leprosy, viz. the sanious or ulcerous type, are excluded,[3] but persons suffering from the less aggravated form of that disease, viz. the anæsthetic form, are not excluded.[4]

Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease are the tests for the exclusion from inheritance.[5]

Although there are no cases on the subject, there seems no reason why the text of the law should not be followed, and why, if it be clearly proved that a person is suffering from a serious and incurable disease such as cancer or phthisis he should not be excluded. In the case of the latter disease, as modern research has produced cures in cases which before were treated as incurable, it would be difficult to prove a case of exclusion. As to the former disease much might depend on the situation and stage of the disease.[6]

In ancient times there were many other grounds for exclusion from inheritance and partition, but as they were removable by expiation, it is said that the Courts would not apparently now give effect to them.[7] There is, however, authority that expiation is necessary.[8] For instance, "an enemy of his father" was excluded,[9] but this portion of the law is now obsolete.[10]

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[1] See *Bakubai* v. *Manchabai* (1864), 2 Bom. H. C. 5.

[2] "Mitakshara," chap. ii. s. 10, in para. 2, "marasmus" (atrophy) is given as an example; Colebrooke's "Digest," vol. iii. p. 321.

[3] *Ananta* v. *Ramabai* (1877), 1 Bom. 554; *Janardhan Pandurang* v. *Gopal* (1868), 5 Bom. H. C. A. C. J. 145; *Muttuvilaya* v. *Parasakti*, 1 Mad. S. D. A. 239; *Bhoobunessuree Debia* v. *Gouree Doss Turkopunchaun* (1869), 11 W. R. C. R. 535. See *Bhagaban Ramanuj Das* (*Mohunt*) v. *Roghunundun Ramanuj Das* (*Mohunt*) (1895), 22 I. A. 94; 22 Calc. 843; *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1833), 5 Ben. Sel. R. 315 (2nd ed. 369); K. K. Bhattacharya's "Law of Joint Family," pp. 408, 409.

[4] *Kayarohana Pathan* v. *Subbaraya Thevan* (1913), 38 Mad. 250; *Runchhod Naran* v. *Ajoobai* (1907), 9 Bom. L. R. 114.

[5] *Kayarohana Pathan* v. *Subbaraya Thevan* (1917), 38 Mad. 250, at p. 255.

[6] K. K. Bhattacharya ("Law of Joint Family," pp. 407, 408) points out the difficulty in holding that a disease is incurable. See *Issur Chunder Sein* v. *Ranee Dossee* (1865), 2 W. R. C. R. 125.

[7] See Mayne's "Hindu Law," 8th ed., p. 830.

[8] Sircar's "Vyavastha Darpana," 2nd ed., pp. 1007, 1008. See, however, *Bhoobunessuree Debia* v. *Gouree Doss Turkopunchanun* (1869), 11 W. R. C. R. 535; *Bholanath Raee* v. *Sabitra* (*Mussummaut*) (1836), 6 Ben. Sel. R. 62 (new edition, 71); *Sheonauth Rai* v. *Dayamyee Chowdrain* (1814), 2 Ben. Sel. R. 108 (new edition, 137).

[9] "Mitakshara," chap. ii. s. 10, para. 3. See *Jye Koonwur* (*Musst.*) v. *Bhikaree Singh*, Ben. S. D. A. 1848, p. 320; *Bholanath Raee* v. *Sabitra* (*Mussummaut*) (1836), 6 Ben. Sel. R. 62 (new edition, 71).

[10] *Kalka Pershad* v. *Budree Sah*

Although "Manu"[1] treats fraud by one of the coparceners as operating as a forfeiture of his share, it seems clear that it has no such effect, but that the defrauding coparcener is merely compelled to bring into partition the property of which he sought to defraud his coparceners.[2]

The burden of proof is upon the person seeking to prove the disqualification.[3]

No one is entitled to take by inheritance the property of a person to whose murder he has been an accessory.[4] Murder by heir.

It has been held that he is entitled to maintenance out of such estate.[5]

When an heir is disqualified, the next heir of the deceased succeeds, as if the disqualified person were dead.[6] Result of disqualification.

The son of a person excluded from inheritance can inherit if he is himself an heir, but he does not inherit as the son of his father.[7]

Illustration.

A. leaves a sister's son who is blind, and has a son B. B. cannot inherit.[8]

The wife or widow of a disqualified Hindu, in cases governed by the Bombay law, does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she be herself Wife of disqualified person in Bombay.

(1871), 3 N. W. P. H. C. 267. See *Khettermoni Dassi (Sm.)* v. *Kadambini Dassi (Sm.)* (1912), 16 C. W. N. 964, at p. 967.

[1] Chap. ix. para. 213.

[2] *Kalka Pershad* v. *Budree Sah* (1871), 3 N. W. P. H. C. 267. See Colebrooke's "Digest," vol. ii. p. 564, vol. iii. p. 398; "Yajnavalkya," ii. para. 126; "Mitakshara," chap. i. s. 9; "Smriti Chandrika," chap. xiv. paras. 4–6; "Vyavahara Mayukha," chap. iv. s. 6, para. 3; Strange's "Hindu Law," vol. i. p. 232; Strange's "Manual," s. 273; West and Bühler's "Hindu Law," 2nd ed., pp. 307, 308; "Viramitrodaya" (Sarkar's translation), p. 245; "Dayabhaga," chap. xiii. para. 2; "Daya-Krama-Sangraha," chap. viii.

[3] See *Ran Bijai Bahadur Singh (Dewan)* v. *Jagatpal Singh (Rae)* (1890), 17 I. A. 173; 18 Calc. 111.

[4] *Vedanayaga Mudaliar* v. *Vedammal* (1904), 27 Mad. 591; S. C. after remand, *Vedammal* v. *Vedanayaga Mudaliar* (1907), 31 Mad. 100; *Gangu* v. *Chandrabhagabai* (1907), 32 Bom. 275; 12 Bom. L. R. 149. It may be an interesting question as to what is the effect upon the right of survivorship in the case of the murder of one coparcener by another.

[5] *Nilmadhab Mitter* v. *Jotindra Nath Mitter* (1913), 17 C. W. N. 341.

[6] *Pareshmani Dasi* v. *Dinanath Das* (1868), 1 B. L. R. A. C. 117; 11 W. R. A. O. J. 19, note; *Bodhnarain Singh (Baboo)* v. *Omrao Singh (Baboo)* (1870), 13 M. I. A. 519; 6 B. L. R. 509; 15 W. R. P. C. 1; W. Macnaghten's "Hindu Law," vol. ii. p. 42.

[7] *Pareshmani Dasi* v. *Dinanath Das* (1868), 1 B. L. R. A. C. 117; 11 W. R. A. O. J. 19, note. As to adopted sons of disqualified persons, see *ante*, pp. 109, 110.

[8] *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103, at p. 116; 11 W. R. A. O. J. 11, at p. 16.

free from any of the defects which exclude a person from inheritance under the Hindu law.[1]

There is nothing to prevent the widow of a disqualified person from inheriting as heir to her husband, or to her son.[2]

Property which has once vested cannot be devested by a subsequent disqualification,[3] and conversely the removal of the ground of exclusion, as, for instance, when the insanity ceases, does not devest the estate of a person who has taken.[4]

The birth of a son to the disqualified person does not devest the estate of a person who has taken as heir.[5]

Stridhan property.

It is undecided whether the physical defects which exclude from inheritance to the property of a male also exclude in the case of inheritance to a female,[6] the texts on the subject being directed to the case of inheritance from males.

Sastri G. C. Sarkar contends that no distinction is to be made between the two cases.[7] The question as to whether a married daughter having a dumb son can inherit *stridhan* property under the Bengal school was considered in *Charuchunder Pal* v. *Nobo Sunderi Dasi*,[8] and decided in her favour on the ground that it was not shown that the dumbness was incurable.

Change of religion and loss of caste.

Change of religion or loss of caste for any reason [9] does not *per se* exclude from inheritance.[10]

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[1] *Gangu* v. *Chandrabhagabai* (1907), 32 Bom. 275; 10 Bom. L. R. 149.

[2] See *Ooma Dibya* v. *Rammuni Dibya* (1812), Wm. Macnaghten's "Hindu Law," ii. 130.

[3] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 153; 5 Calc. 776, at p. 788; 6 C. L. R. 322, at p. 332; *Abilakh Bhagat* v. *Bhekhi Mahto* (1895), 22 Calc. 864; *Tirbeni Sahai* v. *Muhammad Umar* (1905), 28 All. 247; *Sanku* v. *Puttamma* (1890), 14 Mad. 289, at p. 294; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509; *Balgovinda (Musst.)* v. *Lal Buhadoor*, Ben. S. D. A. 1854, p. 244; *Ran Bijai Bahadur Singh (Dewar)* v. *Jagatpal Singh (Rae)* (1890), 17 I. A. 173; 18 Calc. 111.

[4] *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509.

[5] *Kalidas Das* v. *Krishan Chandra Das* (1869), 2 B. L. R. F. B. 103; 11 W. R. A. O. J. 11; *Pareshmani Dasi* v. *Dinanath Das* (1868), 1 B. L. R. A. C. 117; 11 W. R. A. O. J. 19, note; *Deo Kishen* v. *Budh Prakash* (1883), 5 All. 509; *Bapuji Lakshman* v. *Pandurang* (1882), 6 Bom. 616; *Pawadewa* v. *Venkatesh Hanmant Kulkarni* (1908), 32 Bom. 455; 10 Bom. L. R. 559.

[6] Banerjee's "Law of Marriage," 3rd ed., pp. 361, 362.

[7] "Hindu Law," 3rd ed., p. 333.

[8] (1891), 18 Calc. 327.

[9] *Subbaraya Pillai* v. *Ramasami Pillai* (1899), 23 Mad. 171.

[10] Act XXI. of 1850. *Bhujjun Lal* v. *Gya Pershad* (1870), 2 N. W. P. 446; *Taij Singh* v. *Kousilla (Musst.)* (1866), 1 Agra, 90; *Honamma* v. *Timannabhat* (1877), 1 Bom. 559; *Gopal Singh* v. *Dhungazee* (1865), 3 W. R. C. R. 206; *Karuthedatta* v. *Mele Pullakat Vassa Devan Namboodri* (1866), 1 Ind. Jur. N. S. 236. See *Khunni Lal (Lala)* v. *Gobind Krishna Narain (Kunwar)* (1911), 38 I. A. 87; 33 All. 356; 15 C. W. N. 545; 13 Bom. L. R. 427, reversing *Gobind Krishna Narain* v. *Khunni Lal* (1907), 29 All. 487.

Where the circumstances create the disability apart from the exclusion of caste, the Freedom of Religion Act[1] gives no relief, as where a widow forfeits her right by unchastity.[2]

As to inheritance by a prostitute daughter, see *post*, p. 388.

A member of one of the twice-born classes who is clearly proved to have completely and finally abandoned all worldly affairs,[3] as by entering "into an order of devotion" or becoming a hermit, an ascetic or a perpetual religious student,[4] is excluded from inheritance.[5]

Abandonment of worldly affairs by heir.

There does not seem to be anything in the law to preclude him from returning to the world and resuming his rights if they have not vested in others.

A Sudra who becomes an ascetic is not excluded from inheritance unless some usage is proved to the contrary.[6]

An heir can renounce his right to succession to property.[7]

Renunciation of succession.

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[1] XXI. of 1850.

[2] *Ante*, pp. 368, 369.

[3] This does not include Byragees, *Teeluck Chunder* v. *Shama Churn Prokash* (1864), 1 W. R. C. R. 209.

[4] As to the succession to his property, if any, see *post*, pp. 415, 416.

[5] "Mitakshara," chap. ii. s. x. para. 3; "Daya-Bhaga," chap. v. para. 11; "Vyavahara Mayukha," chap. iv. s. xi. para. 5.

[6] *Harish Chandra Roy* v. *Atir Mahmud* (1913), 40 Calc. 545; 17 C. W. N. 517; *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (1898), 22 Mad. 302.

[7] See *Gooshaeen Teekumjee* v. *Pursotum Lalljee* (1868), 3 Agra, 238; *Ladooiah* (*Mussumat*) v. *Sanvaley* (1868), *Ibid.* 191.

CHAPTER XI.

ORDER OF INHERITANCE TO MALES ACCORDING TO THE MITAKSHARA LAW.

Connection between religion and law of Inheritance.

"THERE is in the Hindu law so close a connection between their religion and their succession to property that the preferable right to perform the *sradh* is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union." [1]

As to the performance of the *sradh*, see *post*, pp. 418, 419.

"He who is entitled to celebrate the obsequial rites of the deceased is also entitled to inherit the property, and he who gets the property must perform the funeral rites of the last owner." [2]

"It is not a maxim of the law that he who performs the obsequies is heir, but that he who succeeds to the property must perform them." [3]

Fixed rules.

"To whatever extent rules of succession may have been founded on religious observances or may now be explained by them, it is clear that fixed rules of law for succession have been established for ages." [4]

For an account of the origin and growth of the Hindu principles of inheritance, see "The Principles of the Hindu Law of Inheritance," by Rajkumar Sarvadhikari, Lectures II., III.

Differences between Mitakshara and Bengal systems.

The Mitakshara law of inheritance and the Bengal law on the same subject differ in some particulars. According to the

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[1] *Soorendronath Roy* v. *Heeramonee Burmoneah* (*Mussamut*) (1868), 12 M. I. A. 81, at pp. 96, 97; 1 B. L. R. P. C. 26, at p. 36; 10 W. R. P. C. 35, at p. 38. See *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 614; 2 W. R. P. C. 31, at p. 39; *Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* (1869), 12 M. I. A. 523, at p. 514; 3 B. L. R. P. C. 13, at p. 18; 12 W. R. P. C. 21, at p. 23; *Ram Singh* (*Bhyah*) v. *Ugur Singh* (*Bhyah*), 13 M. I. A. 373; 5 B L. R. 293; 14 W. R. P. C. 1; Jolly's "Hindu Law of Partition, etc.," p. 168.

[2] R. K. Sarvadhikari's "Hindu Law of Inheritance," p. 12.

[3] Colebrooke in Strange's "Hindu Law," vol. ii. p. 242.

[4] *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83, at p. 90; 19 Mad. 405, at p. 409.

"Mitakshara" all agnates down to the last *samanoduka* must be exhausted before cognates acquire any right.[1] According to the "Daya-Bhaga" cognate *sapindas* are preferred to all *sakulyas*, and cognate *sakulyas* to all *samanodakas*.[2]

There are also other differences arising from the circumstance that according to the former propinquity,[3] and according to the latter, the capacity to benefit the manes of the deceased determines the order of succession.[4]

In the system of inheritance under the Mitakshara school of law propinquity of relationship is the guiding principle for determining the order of inheritance.[5] Mitakshara school. Guiding principle.

The circumstance that agnates down to the last *samanoduka* are preferred to cognates,[6] some of whom are capable of giving greater religious benefits than agnates who are preferred to them, shows this principle clearly.

"According to the 'Mitakshara' *sapinda*[7] relationship arises between two people through their being connected by particles of one body."[8]

The expression "*sapinda*," according to the "Mitakshara," is derived from "*saha*" (with) and "*pinda*" (body), *i.e.* connected by particles of the body.[9]

"Under the Mitakshara, whilst the right of inheritance arises from *sapinda* relationship, or community of blood, in

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[1] *Post*, pp. 380, 397, 398.
[2] *Post*, p. 421.
[3] Note 5, below.
[4] *Post*, p. 417.
[5] See *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215; *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (1894), 19 Bom. 631; *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342, at p. 347.
[6] *Post*, pp. 380, 397, 398.
[7] As to *sapinda* relationship, see *post*, p. 379.
[8] *Umaid Bahadur* v. *Udoi Chand* (1880), 6 Calc. 119, at p. 124; 6 C. L. R. 500, at p. 512; *Ramchandra Morland Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 I. A. 290, at p. 301; 42 Calc. 384; at p. 405; 18 C. W. N. 1154, at p. 1167; 16 Bom. L. R. 863, at p. 888. See *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339; *Nallanna* v. *Ponnal* (1890), 14 Mad. 149; *Ramappa Udayan* v. *Arumugath Udayan* (1893), 17 Mad. 182; *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316.
[9] See *Umaid Bahadur* v. *Udoi Chand* (1880), 6 Calc. 119, at p. 124; 6 C. L. R. 500, at pp. 511, 512; *Amrita Kumari Debi* v. *Lakhi Narayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28, at p. 33; S. C. *Omrit Koomaree Dabee* v. *Luckhee Narain Chuckerbutty*, 10 W. R. F. B. 76, at p. 33; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Muzumdar* (1876), 5 B. L. R. 15, at p. 35; 13 W. R. F. B. 49, at p. 57; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 262; *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 423; Jolly's "Hindu Law of Partition, etc.," 1883, p. 171. As to the meaning of *sapinda*, according to the Bengal school, see *post*, p. 418.

judging of the nearness of blood relationship or propinquity among the *gotraja sapindas*, the test to be applied to discover the preferential heir is the capacity to offer oblations." [1]

In some cases persons who confer no religious benefit are under the Mitakshara system admitted as heirs.

"By the law of the 'Mitakshara,' as interpreted and accepted in Western India, the preferential right to inherit in the classes of *sapindas* is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that in some instances the same person would be the preferential heir, whichever of these tests was adopted." [2]

"The theory that a spiritual bargain regarding the oblation of the customary offerings to the deceased by the taker of the inheritance is the real basis of the whole Indian law of Inheritance, is a mistake which has arisen in the early period of the administration of Hindu law from a too exclusive study of the writers of the Bengal school, and from certain terms often occurring in Colebrooke's translation of Indian law books, notably from the term 'connected by funeral oblations,' [3] the English equivalent chosen by Colebrooke for the well-known Sanskrit term '*Sapinda.*' "[4]

"Propinquity according to the 'Mitakshara' is the ruling principle of the law of inheritance.[5] This propinquity is consanguineous according to Visvesvara Bhatta and Balam Bhatta, the two eminent commentators of the 'Mitakshara,' and it is measured, says Mitra Misra, the great expounder of the doctrines of the Benares school, by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefit, he adds, cannot create the *heritable* right, it is true; but it determines, with precision, the *preferable* right of *gotrajas* and other heirs, where there is more than one claimant to the heritage." [6]

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[1] *Buddha Singh* v. *Lallu Singh* (1915), 42 I. A. 208, at p. 227; 37 All. 604, at p. 623; 20 C. W. N. 1, at p. 14; 17 Bom. L. R 1022, at p. 1039; *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (1916), 1 Patna L. J. 324; 21 C. W. N. [1917, Pat.] 12; *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215, at p. 232; *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 373, at p. 392; 5 B. L. R. 293, at p. 303; 14 W. R. P. C. 1, at p. 3. See *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342, at p. 348; *Gunesh Chunder Roy* v. *Nilkomul Roy* (1874), 22 W. R. C. R. 264; "Viramitrodaya" (G. C. Sarkar's translation), pp. 155–159; Bhattacharya's "Hindu Law," 2nd ed., p. 458; R. K. Sarvadhikari's "Hindu Law of Inheritance," p. 713.

[2] *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212, at p. 234; 5 Bom. 110, at p. 121; 7 C. L. R. 450; S. C. in court below, *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388.

[3] This has now been recognized as a mistranslation, see *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 343; *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 431.

[4] Jolly's "Hindu Law of Partition, etc.," p. 168, approved of in *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215, at p. 227.

[5] See *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1909), 33 Mad. 436.

[6] Sarvadhikari's "Hindu Law of Inheritance," pp. 647, 648, approved of in *Janki Ram* v. *Nand Ram* (1888), 11 All. 194, at pp. 212, 213.

The Mitakshara school recognizes two successive classes of heirs: (*a*) gentiles, viz. males descended from a common male ancestor entirely through males; and (*b*) *bandhus*, viz. persons within the degree of *sapinda* but connected through females. Classes of heirs.

The gentiles are divided into: (*a*) the *sagotra* or *gotraja* [1] *sapindas*, *i.e.* persons within the degree of *sapinda* and connected entirely through males; and (*b*) *samanodakas*.

According to the "Mitakshara" definition a *sapinda* of a man means and includes:—

"1. Any descendant within the seventh degree [2] reckoned from and inclusive of himself; that is, any of his six descendants; Meaning of "*sapinda*."

"2. Any ascendant within the seventh degree reckoned from and inclusive of himself in the paternal line;

"3. Any collateral descendant within the seventh degree reckoned from and inclusive of any of the six paternal ascendants, that is, any of the first six ascendants in the paternal line;

"4. Any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line; that is, any of the four maternal ancestors, namely, the mother, her father, her grandfather, and the rest; and

"5. Any collateral descendant within the fifth degree reckoned from and inclusive of any of the three maternal ancestors, beginning with the mother's father; that is, any of the first four descendants of any of the three maternal ancestors, beginning with the mother's father." [3]

Thus a paternal grandfather's son's son's daughter's daughter's son is not an heir. [4]

According to the Mitakshara system *samanodakas* (lit. Meaning of "*samanodaka*."

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[1] Belonging to the same *gotra* or family.

[2] Colebrooke's translation of "Mitakshara," chap. ii. s. v. para. 5, is said to be inaccurate. It should be: "In this manner must be understood the succession of *sagotra sapindas* as far as the seventh person." Jolly's "Hindu Law of Partition, etc.," pp. 209, 210. In this calculation of degrees both the propositus and the heir are included.

[3] *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 345, referring to R. K. Sarvadhikari's "Hindu Law of Inheritance," pp. 601–605; *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 I. A. 290; 42 Calc. 384; 18 C. W. N. 1154; 16 Bom. L. R. 863. See *Kalian Singh* v. *Pan Kuar* (*Mussamat*) (1875), 7 N. W. P. 338; "Manu," chap. v. para. 60; "Vyavahara Mayukha," chap. iv. s. viii. para. 21.

[4] *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 I. A. 290; 42 Calc. 384; 18 C. W. N. 1154; 16 Bom. L. R. 863.

connected through libations of water) include all agnates who are not *sapindas*.[1]

According to some authorities they do not include relations beyond the thirteenth degree.[2]

Sastri G. C. Sarkar[3] enumerates the *samanodakas* in the following words: "They are thirteen descendants of the deceased himself, his thirteen ascendants, and thirteen descendants of each of these thirteen ascendants—all in the male line; from these the *sapindas* are to be deducted, then the remaining one hundred and forty-seven relations are within the term *samanodakas*. They are the distant agnate relations. According to some, the term includes remoter distant relations of the same *gotra*, if the relationship can be traced and is remembered."

As to the order of their succession, see *post*, pp. 381 *et seq.*

Polyandrous tribes.

Among polyandrous tribes succession is necessarily traced through the mother.[4]

Sagotra Sapindas.

Order of succession.

Under the Mitakshara law the succession first goes to the *sagotra sapindas*[5] in order of propinquity,[6] such as are joint with the deceased being preferred to others of the same class.[7]

Order of propinquity.

Apart from the widow,[8] and the daughter's son,[9] the scheme of succession of *gotraja sapindas* is described by Rajkumar Sarvadhikari[10] as follows:—

"There are thus fourteen classes of sapinda heirs. Four of these classes belong to propinquous sapindas, and ten to remote sapindas.

Propinquous Sapinda Heirs.

1. The three immediate descendants of the deceased.
2. The mother, the father, and their three immediate descendants.

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[1] *Ram Baran Rai* v. *Rajwanti Kuar (Musammat)* (1910), 32 All. 595; *Nursingh Narain* v. *Bhuttun Lall* (1864), W. R. C. R. 197; *Devkore (Bai)* v. *Amritram Jamiatram* (1885), 10 Bom. 372; "Vyavahara Mayukha," chap. iv. s. viii. para. 21; "Manu," chap. v. para. 60; "Mitakshara," chap. ii. s. v. para. 6; Jolly's "Hindu Law of Partition, etc.," p. 210; "Viramitrodaya" (G. C. Sarkar's translation), pp. 199, 200. See *Kalka Parshad* v. *Mathura Parshad* (1908), 35 I. A. 166; 30 All. 510; 13 C. W. N. 1.

[2] *Naraini Kuar* v. *Chandi Din* (1886), 9 All. 467.

[3] "Hindu Law," 3rd ed., 262.

[4] See *Munda Chetti* v. *Timmaju Hensu* (1863), 1 Mad. H. C. 380; *Timmappa Heggade* v. *Mahalinga Heggade* (1868), 4 Mad. H. C. 28; *Devu* v. *Deyi* (1885), 8 Mad. 353; *Mahalinga* v. *Mariyamma* (1889), 12 Mad. 462.

[5] *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at pp. 417, 437; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133 (a Mithila case).

[6] *Samat* v. *Amra* (1882), 6 Bom. 394; "Vyavahara Mayukha," chap. iv. s. viii. para. 21; Colebrooke's "Digest," vol. iii. p. 525. See "Manu," chap. ix. para. 187.

[7] See *post*, p. 391.

[8] *Post*, pp. 386, 387.

[9] *Post*, pp. 389, 390.

[10] "Hindu Law of Inheritance," pp. 654, 655.

3. The grandmother and the grandfather with their three immediate descendants.

4. The great grandmother and the great grandfather with their three immediate descendants.

Remote Sapinda Heirs.

5. The three remote descendants of the deceased.
6. The three remote descendants in the father's line.
7. The three remote descendants in the grandfather's line.
8. The three remote descendants in the great grandfather's line.
9. The fourth in ascent with his three immediate descendants.
10. The fifth in ascent with his three immediate descendants.
11. The sixth in ascent with his three immediate descendants.
12. The three remote descendants of the fourth ancestor.
13. The three remote descendants of the fifth ancestor.
14. The three remote descendants of the sixth ancestor."

Dr. Jogendronath Bhattacharya took the same view in his work on Hindu law.[1] It was also taken by Mr. Rama Row in the tables drawn up by him for Sir H. S. Cunningham,[2] by Baboo Shama Churn Sircar in his "Vyavastha Chandrika,"[3] and Mr. Strange in his "Manual of Hindu Law."[4]

This system of succession has now been approved by the Judicial Committee.[5]

In addition to possible *gotraja sapindas* the following list includes some remote ascendants and descendants who, although theoretically heirs, cannot in the ordinary course of nature be expected to survive the deceased in question.

The *sagotra sapindas* succeed in the following order :—

1. Son.[6] Son.

If there be more than one son, the sons, whether they are by the same or by different mothers, succeed equally.[7]

A son, son's son, or son's son's son who has remained joint with his father, grandfather, or greatgrandfather, as the case may be, excludes a son,[8] son's son,[9] or son's son's son, who has separated. Failing an unseparated Undivided before divided.

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[1] 2nd ed., p. 436.

[2] Cunningham's "Digest of Hindu Law," p. 115.

[3] Vol. iii. pp. 90 *et seq.*

[4] Para. 315.

[5] As expressed in *Buddha Singh* v. *Laltu Singh* (1915), 42 I. A. 208; 37 All. 604; 20 C. W. N. 1; 17 Bom. L. R. 1022, and *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133, but the question in the latter case was only whether all *sagotra sapindas* come before *bandhus.*

[6] "Mitakshara," chap. ii. s. xi. para. 28; *Ramappa Naicken* v. *Sithammal* (1879), 2 Mad. 182; *Yachereddy Chinna Bassavapa* v. *Yachereddy Gowdapa* (1835), 5 W. R. P. C. 114.

[7] *Nugendur Narain (Rajah)* v. *Rughoonath Narain Dey*, W. R. (1864), C. R. 20.

[8] *Ramappa Naicken* v. *Sithammal* (1879), 2 Mad. 182, at p. 185; *Nana Tawker* v. *Ramachandra Tawker* (1908), 32 Mad. 377.

[9] *Fakirappa* v. *Yellappa* (1896), 22 Bom. 101. See *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348, at p. 353.

son,[1] son's son, or son's son's son, a separated son succeeds, his son or son's son taking by representation.[2]

Illegitimate sons.

"The Hindu law does not, like the English law, consider an illegitimate person *quasi nullius filius*. It recognizes his relationship to his father and family, and secures him substantial rights." [3]

As to his right to inherit to his mother, see *post*, p. 462.

Twice-born classes.

According to all the schools the illegitimate son of a member of one of the twice-born classes has no rights of inheritance to his father, even if his father was himself illegitimate,[4] but he is entitled to maintenance.[5]

A custom to inherit might be valid, but in all the reported cases in which one has been set up, the right has been negatived.[6]

In *Radhakishen* v. *Rajkuar* (1891),[7] the Allahabad High Court upheld the rights of the illegitimate sons of a Brahmin who had been outcasted, had separated from his family, and acquired, after such separation, the property in dispute.

Sudras.

According to the Mitakshara school [8] in the case of *Sudras*, an illegitimate son is an heir of his father,[9] provided his mother

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[1] See *Marudayi* v. *Doraisami Karambian* (1907), 30 Mad. 348; *Ramappa Naicken* v. *Sithammal* (1879), 2 Mad. 182; *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54; "Mitakshara," chap. i. s. vi. paras. 4–6.

[2] *Post*, pp. 385, 386.

[3] *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 482; *Ram Kali* v. *Jamma* (1908), 30 All. 508, at p. 509.

[4] *Hari Krishna Devi Garu* (*Sri Gajapaty*) v. *Radhika Patta Mahadevi Garu* (*Sri Gajapaty*) (1865), 2 Mad. H. C. 369.

[5] *Run Murdun Syn* (*Chuotorya*) v. *Sahub Purhulad Syn* (1857), 7 M. I. A. 18; 4 W. R. P. C. 132; *Parichat* (*Rajah*) v. *Zalim Singh* (1877), 4 I. A. 159; 3 Calc. 214; *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (1868), 12 M. I. A. 203; 2 B. L. R. P. C. 15; 11 W. R. P. C. 6; S. C. on remand, *Coomara Yettapa Naikar* v. *Venkateswara Yettia* (1870), 5 Mad. H. C. 405; *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478, at p. 482 (S. C. on appeal, below note 9); *Puhoop Singh* v. *Khooman* (1868), 3 Agra, 313; "Mitakshara," chap. i s. xii. para. 3; *ante*, pp. 99, 207, 208.

[6] *Bhaoni* v. *Maharaj Singh* (1881), 3 All. 738; *Mohun Sing* v. *Chumun Rai* (1799), 1 Ben. Sel. R. 28 (new edition, 37); *Pershad Singh* v. *Muhesree* (*Ranee*) (1821), 3 Ben. Sel. R. 132 (new edition, 176).

[7] 13 All. 573. Although in this case substantial justice may have been done it is submitted that the loss of caste and subsequent conduct did not prevent the application of the Hindu law.

[8] As to the Bengal school, see *post*, p. 423.

[9] *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1869), 13 M. I. A. 141, at p. 159; 3 B. L. R. P. C. 1, at p. 21; 12 W. R. P. C. 41, at p. 43; S. C. in court below, *Pandaiya Telaver* v. *Puli Telaver* (1863), 1 Mad. H. C. 478; *Krishnayyan* v. *Muttusami* (1883), 7 Mad 407, at p. 412; *Brindavana* v. *Radhamani*

was a kept mistress of his father,[1] and he was not the fruit of intercourse with a woman whom the law did not permit the father to marry.

Thus a son by a married woman,[2] or by a woman within the prohibited degrees for marriage,[3] or by a widow whose remarriage is not permitted by Hindu law,[4] does not inherit.

Competition with other heirs.

The Mitakshara law on this subject is based upon the following text of Yajnavalkya: [5] "Even the son begotten by a Sudra on a Dasi [6] shall have such share as (the father) may allot. (But if there be no partition till) after the father's death, then the brothers are to assign him half a share; if there be no such brothers nor daughter's sons, he takes the whole." The "Mitakshara" [7] supplements this by providing that if there be a daughter or daughter's son, the illegitimate son takes half a share, and that failing these he takes the whole estate.

With legitimate sons.

The following is the result of the decisions upon these texts: Where there are legitimate sons, the illegitimate son becomes a coparcener with them,[8] with rights of survivorship to the exclusion of the widow,[9] and on a partition he takes half the share of a legitimate son.[10]

(1888), 12 Mad. 72, at p. 86; *Vencataram* v. *Vencata Lutchemee Ummal* (1815), 2 Str. N. C. 127, at p. 137. He is a male lineal descendant within the meaning of the Agra Tenancy Act (II. (N. W. P.) of 1901), s. 22, *Ram Kali* v. *Jamma* (1908), 30 All. 508.

[1] *Sarasuti* v. *Mannu* (1879), 2 All. 134; *Krishnayyan* v. *Muttusami* (1883), 7 Mad 407; *Sadu* v. *Baiza* (1878), 4 Bom. 37, at p. 44; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Gangabai* v. *Bandu* (1915), 40 Bom. 369; 18 Bom. L. R. 70; R. K. Sarvadhikari ("Hindu Law of Inheritance," p. 939) contends that the law under the "Mitakshara" is the same in this respect as under the Bengal school (*post*, p. 423). In *Chatturbhuj Patnaik* v. *Krishna Patnaik* (1912), 17 C. W. N. 442, at p. 445 the Court said, "We hold, therefore, that if a Sudra governed by the Mitakshara law has a permanent, continuous and exclusive concubine, who lives as a member of his family, she is a *dasi*, and his illegitimate son by her who is himself brought up as a member of the family, is a *dasi putra* within the meaning of the rule laid down in the Mitakshara."

[2] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97; *Dalip* v. *Ganpat* (1886), 8 All. 387; *Vencatachella Chetty* v. *Parvatham* (1875), 8 Mad. H. C. 134. See as to this, Jolly's "Hindu Law of Partition, etc.," p. 188. As to his right of maintenance, see *ante*, pp. 207, 208.

[3] *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu* (1869), 4 Mad. H. C. 204.

[4] *Annayan* v. *Chinnan* (1909), 33 Mad. 366.

[5] II. 133, 134. Ghose's "Hindu Law," 2nd ed., p. 662.

[6] This expression, though primarily meaning a female slave, includes any unmarried female Sudra, see Jolly's "Hindu Law of Partition, etc.," p. 189.

[7] Chap. i. s. xii. para. 2.

[8] *Jogendra Bhupati Hurri Chundun Mahapatra* (*Raja*) v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151; S. C. in court below (1885), 11 Calc. 702; *Vencataram* v. *Vencata Lutchemee Ummal* (1815), 2 Str. N. C. 127, at p. 137; *Soundararajan* v. *Arunachalam Chetty* (1915), 39 Mad. 136; *ante*, pp. 227, 228.

[9] *Sadu* v. *Baiza* (1878), 4 Bom. 37.

[10] *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 344; *Rahi* v. *Govinda, Valad Teja* (1875), 1 Bom. 97, at p. 104; *Kesaree* v. *Samardhan* (1873), 5 N. W. P. 94; *Chellammal* v. *Ranganatham Pillai* (1910), 24 Mad. 277; "Mitakshara," chap. i. s. xii. para. 2; "Vyavahara Mayukha," chap. iv. s. 4, para. 32; "Viramitrodaya" (G. C.

There is a difference of opinion as to whether the half share to be taken by an illegitimate son means half the share which has been actually taken by the legitimate son,[1] or whether it means half the share which the illegitimate son would have taken if he had been legitimate.[2] In the former case a legitimate and illegitimate son would share in the proportion of two to one, and in the latter case they would share in the proportion of three to one. It is submitted that reason and the greater authority is to be found in support of the former view.

With daughter or daughter's son.

The rights of an illegitimate son in competition with a widow, a daughter, or a daughter's son, do not seem to be quite settled. In competition with a daughter or daughter's son, he would, under the above text of the "Mitakshara," [3] take half the share taken by such daughter or daughter's son.[4] It has been held in Madras that he is an equal sharer with a daughter's son,[5] but it is submitted that this decision is not justified by the text [6] of the "Mitakshara."

Competition with widow.

It has been held in Bombay [7] that where there is a widow and an illegitimate son, the latter takes the whole property subject to the maintenance of the widow, but that decision has been doubted in Madras.[8] The case of a widow was not provided for by the texts, probably on the ground that her rights had not then arisen, but as she is now recognized as a preferable heir to a daughter, it is submitted that her rights in competition with an illegitimate son are not less than those of a daughter, and that the texts might be construed as implying the rights of an illegitimate son to a half share in the case of the existence of any heir down to and including a daughter's son, and to not more than such half a share,[9] otherwise the result might be that, where there is an illegitimate son, the daughter gets a share to the exclusion of the widow, and where there is no such son the daughter is postponed to the widow. This is somewhat anomalous,

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Sarkar's translation), p. 130. Dr. Jogendranath Bhattacharya ("Hindu Law," 2nd ed., p. 434) says as to the text of Yajnavalkya (*ante*, p. 383), "The injunction is so worded as to show clearly that the illegitimate son has no legal right to such share."

[1] See *Sadu* v. *Baiza* (1878), 4 Bom. 37, at p. 42; Jolly's "Hindu Law of Partition, etc.," pp. 188, 189; *Kesaree* v. *Samardhan* (1873), 5 N. W. P. 95.

[2] Mayne's "Hindu Law," 8th ed., pp. 773, 774; West and Bühler's "Hindu Law," 2nd ed., pp. 40, 41, 108, 110. Cf. "Mitakshara," chap. i. s. vii. para. 7.

[3] *Ante*, p. 383.

[4] *Gangabai* v. *Bandu* (1915), 40 Bom. 369; 18 Bom. L. R. 70; *Sarasuti* v. *Mannu* (1879), 2 All. 134; Ghose's "Hindu Law," 2nd ed., pp. 656, 661; Sarvadhikari's "Hindu Law of Inheritance," p. 943. See *Ranoji* v. *Kandoji* (1885), 8 Mad. 557, at p. 561; *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97, at p. 104.

[5] *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 344; Strange's "Hindu Law," vol. ii. p 70.

[6] *Ante*, p. 383.

[7] *Rahi* v. *Govinda Valad Teja* (1875), 1 Bom. 97, at p. 106. Dr. Jolly ("Hindu Law of Partition, etc.," pp. 189, 190) supports this view. See *Sadu* v. *Baiza* (1878), 4 Bom. 37, at p. 52, which was a case of the sons succeeding as coparceners, and therefore stands upon a different footing, see *ante*, pp. 227, 228.

[8] *Ranoji* v. *Kandoji* (1885), 8 Mad. 557, at pp. 561, 563.

[9] See Mayne's "Hindu Law," 8th ed., pp. 771–774; *Shesgiri* v. *Girewa* (1887), 14 Bom. 282; *Ranoji* v. *Kandoji* (1885), 8 Mad. 557, at pp. 561, 563; *Ramalinga Muppan* v. *Pavadai Goundan* (1901), 25 Mad. 519, at pp. 521, 522; *Ambabai* v. *Govind* (1898), 23 Bom. 257, at p. 265.

but it is said to be "one of those arbitrary arrangements not uncommon in Hindu law."[1]

It has been held in Madras[2] that when there is a widow and an illegitimate son, they each get half, but it is submitted that that decision is not correct.[3] In Bombay a case,[4] where there were a widow and daughter and illegitimate sons, it was held that the sons took a half share, but the question as to competition with the widow did not arise.

Competition with other heirs.

The illegitimate son takes the whole in preference to any heir after a daughter's son.[5]

Impartible estate.

It has been held in Madras that an undivided brother[6] and a widow[7] are to be preferred to an illegitimate son in the succession to an impartible Raj; but in *Jogendra Bhupati Hurri Chundun Mahapatra (Raja)* v. *Nityanund Mansingh*,[8] the Judicial Committee held that an illegitimate son succeeded to his brother in an ancestral impartible Raj as against the widows and daughter of the brother.

No inheritance to collaterals.

An illegitimate son has only rights in his father's or mother's property. He does not succeed as heir to any collaterals.[9]

For a comparison of the rights of an adopted son and of an illegitimate son, see *Parvathi* v. *Thirumalai* (1889), 10 Mad. 334, at p. 344.

Son's son.

2. Son's son.[10]

Son's sons take by representation in equal shares the share of a son who has predeceased his father, even if the deceased has left a son.[11]

As to the preference of the undivided before the divided son's sons, see *ante*, pp. 381, 382.

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[1] *Sadu* v. *Baiza* (1878), 4 Bom. 37, at p. 56.

[2] *Chinnamal* v. *Varadarajulu* (1892), 15 Mad. 307; *Meenakshi Anni* v. *Appakutti* (1909), 33 Mad. 226.

[3] See Ghose's "Hindu Law," 2nd ed., p. 661.

[4] *Shesgiri* v. *Girewa* (1889), 14 Bom. 282.

[5] *Sarasuti* v. *Mannu* (1879), 2 All. 134; "Dattaka Chandrika," chap. v. paras. 30, 31.

[6] *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334.

[7] *Kulanthai Natchear* v. *Ramamani* (Mad. Reg. App. 86 of 1865), referred to in *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 346.

[8] (1890), 17 I. A. 128; 18 Calc. 151; *post*, p. 520.

[9] *Shome Shankar Rajendra Varere* v. *Rajesar Swami Jangam* (1898), 21 All. 99, where it was held that he did not inherit to a brother; *Parvathi* v. *Thirumalai* (1887), 10 Mad. 334, at p. 344; *Nissar Murtojah* v. *Dhunwunt Roy (Kowar)* (1863), Marsh, 609; *Ramalinga Muppan* v. *Pavadai Goundan* (1901), 25 Mad. 519, at p. 522; *Krishnayyan* v. *Muttusami* (1883), 7 Mad. 407; *Karuppa Goundan* v. *Kumarasami Goundan* (1901), 25 Mad. 429; *Ravji* v. *Sakuji* (1909), 34 Bom. 321; 12 Bom. L. R. 204.

[10] *Balkrishna Trimbak Tendulkar* v. *Savitribai* (1878), 3 Bom. 54. See "Mitakshara," note to chap. xi.

[11] *Marudayi* v. *Doraisami* (1907), Mad. 348; *Ananda Bibee* v. *Nownit Lal* (1882), 9 Calc. 315, at p. 320; *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 363, at p. 378; *Luchomun Pershad* v. *Debee Pershad* (1864), 1 W. R. C R. 317; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M I. A. 133, at p. 158.

The legitimate son of an illegitimate son has the same rights of succession as his father had against the brothers and sons of his grandfather.[1]

A son's daughter is not a *gotraja sapinda* even in Bombay.[2]

Son's son's son.

3. Son's son's son.[3]

Where a son and his sons have predeceased the deceased, the son's son's son will take by representation, even though the deceased or his son has left other sons.[4] If there be more than one son's son's son, they take in equal shares.

Widow.

4. Widow.[5]

On marriage a wife enters the *gotra* (family) of her husband.[6] A widow is looked upon as being the surviving half of her husband.[7]

As to the interest taken by a widow in the estate of her husband, see *post*, Chap. XV.

Among the Tiyan community in Calicut a brother succeeds to self-acquired property in preference to the widow.[8]

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[1] *Ramalinga Muppan* v. *Pavadai Goundan* (1901), 25 Mad. 519. As to the illegitimate son of an illegitimate son, see *ibid.* at p. 524; *Fakirappa* v. *Fakirappa* (1902), 4 Bom. L. R. 809. As to the right of an illegitimate son, see *ante*, pp. 382–385.

[2] *Venilal* v. *Parjaram* (1894), 2 Bom. 173.

[3] See "Mitakshara," note to chap. xi.

[4] See cases *ante*, p. 385, note 11.

[5] "Mitakshara," chap. ii. s. i. paras. 5, 6; s. ii. para. 2; "Vivada Chintamani" (P. C. Tagore's translation), pp. 290, 291; *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at pp. 611, 612; 2 W. R. P. C. 31, at p. 39; *Periasami* v. *Periasami* (1878), 5 I. A. 61; 1 Mad. 312; 2 C. L. R. 81; *Doorga Persad Singh (Tekait)* v. *Doorga Konwari (Tekaitni)* (1878), 5 I. A. 149, at p. 160; 4 Calc. 190, at p. 202; 3 C. L. R. 31, at p. 40; *Venkata Gopalla Narasimha Row Bahadur (Rajah Suraneni)* v. *Lakshma Venkama Row (Rajah Suraneni)*, 13 M. I. A. 113; 3 B. L. R. P. C. 41; 12 W. R. P. C. 40; *Radhika Patta Maha Devi Garu (Sri Gajapathi)* v. *Nilamani Patta Maha Devi Garu (Sri Gajapathi)* (1870), 13 M. I. A. 497; 6 B. L. R. 202; 14 W. R. P. C. 33; *Narayan Ayyar* v. *Lakshmi Ammal* (1867), 3 Mad. H. C. 289; *Patni Mal (Rajah)* v. *Ray Manohar Lal* (1834), 5 Ben. Sel. R. 349 (new edition, 410); *Keerut Sing* v. *Koolahul Sing* (1839), 2 M. I. A. 331; 5 W. R. P. C. 131; *Soorjoon (Musumat)* v. *Ishree Brahmun* (1871), 3 N. W. P. 74; *Goolab (Mt.)* v. *Phool (Mt.)* (1816), 1 Borr. 154; *Govinddas Dhoolubhdas* v. *Muha Lukshumee* (1819), 1 Borr. 241. As to Jains, see *Sheo Singh Rai* v. *Dakho (Musst)* (1874), 6 N. W. P. 382; S. C. on appeal (1878), 5 I. A. 87; 1 All. 688; 2 C. L. R. 193.

[6] *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at pp. 420, 440.

[7] *Murugayi* v. *Viramakali* (1877), 1 Mad. 226, at p. 228; Colebrooke, "Digest," vol. iii. p. 458; "Smriti Chandrika," chap. xi. s. i. para. 6. See Bhattacharya's "Hindu Law," 2nd ed., p. 437, note.

[8] *Rarichan* v. *Perachi* (1892), 15 Mad. 281.

Where there is more than one widow, they all take as a single heir with rights of survivorship [1] and partition.[2] — Two or more widows.

There is nothing to prevent a widow releasing her right of survivorship.[3]

In the case of impartible property the senior widow takes, the other widows having rights of maintenance.[4] — Impartible property.

The estate of the widow is devested by the birth [5] or adoption [6] of a son. — Devesting of estate.

5. Daughter.[7] — Daughter

Of daughters an unmarried one is preferred,[8] whether or not she is well to do.[9] — Unmarried.

Failing unmarried daughters, married daughters succeed.[10] Among married daughters the one who is "unprovided for" is to be preferred to the one who has means,[11] either derived from her father or from other sources.[12] — Married.

Comparative poverty is in each case the criterion by which the claims of married daughters are settled,[13] but such comparison does not apparently involve a minute investigation of the means of the daughters, the question being whether the pecuniary circumstances of the one are so far different from those of the other as to give her a prior right of inheritance.[14]

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[1] *Rumea* v. *Bhagee* (1862), 1 Bom. H. C. 66; *Jijoyiamba Bayi Saiba* (H. H. M.) v. *Kamakshi Bayi Saiba* (H. H. M.) (1868), 3 Mad. H. C. 424; *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487; 9 W. R. P. C. 23; *Nilamani Patta Maha Devi Garu* (*Sri Gajapathi*) v. *Radhamani Patta Maha Devi Garu* (1877), 4 I. A. 212; 1 Mad. 290; *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayamma* (*Raja Chelikani*) (1902), 29 I. A. 156, at p. 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; 4 Bom. L. R. 657.

[2] See *ante*, pp. 327, 328.

[3] *Ramakkal* v. *Ramasami Naickan* (1899), 22 Mad. 522.

[4] Mayne's "Hindu Law," 8th ed., p. 776.

[5] *Ante*, p. 363.

[6] *Ante*, p. 193.

[7] "Mitakshara," chap. ii. s. ii. para. 2; "Vyavahara Mayukha," chap. iv. s. viii. paras. 10–12; *Pranjeevandas Toolseydas* v. *Dewcooverbaee* (1859), 1 Bom. H. C. 130.

[8] "Mitakshara," chap. ii. s. ii. para. 2; "Vyavahara Mayukha," chap. v. s. viii. para. 11; *Dowlut Kooer* v. *Burma Deo Sahoy* (1874), 14 B. L. R. 246, note; 22 W. R. C. R. 54.

[9] *Jamnabai* v. *Khimji Vullubdass* (1889), 14 Bom. 1, at p. 13.

[10] "Mitakshara," chap. ii. s. ii. para. 3; *Himunchull* v. *Maharaj Singh* (1866), 1 Agra, 210; *Buryar Singh* v. *Hunsee* (*Mussumat*) (1867), 2 Agra, 166; *Golab Koonwer* (*Musst*) v. *Shib Sahai* (1867), 2 Agra, 54; *Binode Koomaree Dabee* v. *Purdhan Gopal Sahee* (1865), 2 W. R. C. R. 176, at p. 177.

[11] "Mitakshara," chap. ii. s. ii. para. 4; "Vyavahara Mayukha," chap. iv. s. viii. para. 12.

[12] *Danno* v. *Darbo* (1882), 4 All. 243. The text on which the Court relied in this case, viz. "Mitakshara," chap. ii. s. xi. para. 13, refers to the succession to *stridhan* property.

[13] *Audh Kumari* v. *Chandra Dai* (1879), 2 All. 561.

[14] *Bakubai* v. *Manchhabai* (1864), 2 Bom. H. C. 5; *Poli* v. *Narotum Bapu* (1869), 6 Bom. H. C. A. C. J. 183; *Totawa* v. *Basawa* (1898), 23 Bom. 229.

A married daughter with means is preferred to a daughter's son.[1]

The Mithila law makes no distinction between indigence and wealth, in the case of daughters.[2]

A daughter who has, or is likely to have, male issue is not, as in Bengal,[3] preferred to a barren or childless widow.[4]

Except in the Bombay Presidency, where her interest passes to her heir,[5] on the death of a daughter the estate taken by her, as such, passes (in preference to her sons) to her sisters who have taken or are competent to take.[6]

Except in the Bombay Presidency, where daughters take not only absolute but several estates,[7] daughters take by inheritance a joint estate with rights of survivorship [8] and partition.

The circumstance that her unmarried sister had been preferred to her, does not exclude a married daughter from the inheritance on the death of such sister.[9]

Prostitute daughters.

"A woman, who in her maiden condition becomes a prostitute, being neither a *kanya* (unmarried) nor a *kulastri* (married), but being at the same time, notwithstanding her prostitution, a qualified heir, as held in *Advyapa* v. *Rudrava*, [10] would be entitled to succeed to her father's property only in default of either unmarried or married sisters." [11]

As to the rights of the daughter of a Sudra in competition with the father's illegitimate son, see *ante*, p. 384.

As to the interest taken by a daughter, see *post*, Chap. XV.

Illegitimate daughters have no rights of inheritance.[12]

For cases of customs, excluding daughters and their issue, see *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1907), 35 I. A. 1; 30 All. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348 (Bhale Sultan Chhathris); *Nanaji Utpat* (*Bhau*) v. *Sundrabai* (1874), 11 Bom. H. C. 249 (Utpat families of Pandharpur); *Pragjivan Dayaram* v. *Reva* (*Bai*) (1881), 5 Bom. 482; *Verabhai*

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[1] *Dulari* v. *Mul Chand* (1910), 32 All. 314.

[2] "Vivada Chintamani" (P. C. Tahore's translation), p. 293.

[3] *Post*, pp. 424, 425.

[4] *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40; 3 Calc. 587; 2 C. L. R. 51; *Bakubai* v. *Manchhabai* (1864), 2 Bom. H. C. 5; *Poli* v. *Narotum Bapu* (1869), 6 Bom. H. C. A. C. J. 183; *Simmani Ammal* v. *Muttammal* (1880), 3 Mad. 265.

[5] *Bhagirthibai* v. *Kahnujirav* (1886), 11 Bom. 285; *post*, p. 467.

[6] *Baijnath* v. *Mahabir* (1878), 1 All. 608; *Sant Kumar* v. *Deo Saran* (1886), 8 All. 365, at pp. 369, 370; *Dulari* v. *Mul Chand* (1910), 32 All. 314; see *post*, p. 425.

[7] *Post* p. 410.

[8] *Bulakhidas* v. *Keshavlall* (1881), 6 Bom. 85; *Kattama Nachiar* v. *Dorasingha Tevar* (1871), 6 Mad. H. C. 310.

[9] *Dowlut Kooer* v. *Burma Deo Sahoy* (1874), 14 B. L. R. 246, note; 22 W. R. C. R. 54. See *Kattama Nachiar* v. *Dorasinga Tevar* (1871), 6 Mad. H. C. 310, at p. 332; *Dulari* v. *Mul Chand* (1910), 32 All. 314.

[10] (1879), 4 Bom. 104.

[11] *Tara* v. *Krishna* (1907), 31 Bom. 495, at p. 510; 9 Bom. L. R. 774. See *post*, p. 462.

[12] *Bhikya* v. *Babu* (1908), 32 Bom. 562; 10 Bom. L. R. 736.

Ajubhai v. *Hiraba* (*Bai*) (1903), 30 I. A. 234, at p. 236; 27 Bom. 492, at p. 498; 7 C. W. N. 716, at pp. 718, 719 (Chudasama Gameti Garasias); *Parbati Kunwar* (*Mussammat*) v. *Chandarpal Kunwar* (*Rani*) (1909), 36 I. A. 125; 31 All. 457; 13 C. W. N. 1073; 11 Bom. L. R. 890 (Chauhan Rajputs in Oudh). In a case of Gohel Girasias the custom was not established, *Ranchhodas Vithaldas* (*Desai*) v. *Rawal Nathubai Kesabhai* (1895), 21 Bom. 110.

On the death of all the daughters the property passes, except in Bombay,[1] to the then next heir of the father.[2]

6. Daughter's son.[3]

Daughter's son.

He cannot succeed as long as there is any daughter capable of inheriting in existence.[4]

The daughter's son is the only heir connected through a female (*bandhu*) who under the Mitakshara system is placed in the order of succession amongst the *gotraja sapindas.* He is so placed in accordance with special texts.[5]

If he predeceases any one of his maternal grandfather's daughters, his son does not take his place,[6] but succeeds as a *bandhu.*[7]

As to the succession of a daughter's son in competition with the illegitimate son of his mother's father, see *ante*, p. 384.

Except under the "Mayukha," daughters' sons take *per capita*, not *per stirpes.*[8]

Where a widowed daughter having sons remarries, and has sons, apparently the sons of both marriages would succeed equally, but there is no decision on the subject.

When the sons of a daughter are living together as members of a joint family, property so inherited belongs to the coparcenary, and there is a right of survivorship.[9]

As in the case of other male heirs, on the death of a daughter's son, in whom the estate has vested, the succession passes to his heirs, and not to the heirs of his maternal grandfather.[10]

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[1] *Post*, p. 467.

[2] *Chotay Lall* v. *Chunno Lall* (1878), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290; *ante*, p. 365.

[3] *Kattama Nachiar* v. *Dorasinga Tevar* (1871), 6 Mad. H. C. 310; *Buryar Singh* v. *Hunsee* (*Mussumat*) (1867), 2 Agra, 166; *Ram Swaruth Pandey* v. *Basdeo Singh* (*Baboo*) (1867), *Ibid.* 168; *Surja Kumari* v. *Gandhrap Singh* (1837), 6 Ben. Sel. R. 140 (new ed., 168) (a Mithila case).

[4] *Sant Kumar* v. *Deo Saran* (1886), 8 All. 365; *Dulari* v. *Mul Chand* (1910), 32 All. 314.

[5] "Mitakshara," chap. ii. s. ii. para. 6; "Smriti Chandrika," chap. xi. s. ii. para. 28; "Vyavahara Mayukha," chap. iv. s. viii. para. 13; "Vivada Chintamani" (Tagore's translation), p. 294.

[6] *Srinivasa* v. *Dandayudapani* (1889), 12 Mad. 411; *Dharup Nath* v. *Gobind Saran* (1886), 8 All. 614.

[7] *Post*, p. 403.

[8] *Ante*, p. 367.

[9] *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayyamma* (*Raja Chelikani*) (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1; 4 Bom. L. R. 657; *ante*, p. 241.

[10] *Sibta* v. *Badri Prasad* (1880), 3 All. 134; *Muttuvaduganadha Tevar* v. *Periasami* (1896), 23 I. A. 128; 19 Mad. 451; S. C. in court below (1892), 16 Mad. 11; *Ramjoy See* v. *Tarrachund* (1816), 2 Morley's Digest, 79. *Ante*, p. 365.

Impartible property.

Impartible property passes on the death of all daughters to the eldest surviving daughter's son.[1]

Parents of Deceased and their Descendants to the Third Degree.

Mother.

7. Mother.[2]

"Mayukha."

Where the "Mayukha" prevails[3] the father is preferred to the mother.[4]

Stepmother.

Except that in Bombay she has a right of inheritance as the widow of her husband,[5] and that in Madras she has possibly some right of inheritance as a *bandhu*,[6] neither a stepmother nor a stepgrandmother has any rights of inheritance.[7]

Father.

8. Father.[8]

Brother.

9. Brother.[9]

Uterine brothers, *i.e.* brothers of the whole blood, take before brothers of the half blood.[10]

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[1] *Kattama Nachiar* v. *Dorasinga Tevar* (1871), 6 Mad. H. C. 310, at p. 333; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290.

[2] *Vellanki Venkata Krishna Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; *Balkrishna Bapuji Apte* v. *Lakshman Dinkar* (1890), 14 Bom. 605; "Mitakshara," chap. ii. s. iii. para. 3; "Vivada Chintamani" (P. C. Tagore's translation), pp. 293–295. The adoptive mother comes before the adoptive father, *Anandi* v. *Hari Suba Pai* (1909), 33 Bom. 404; 11 Bom. L. R. 641. As to her right to inherit, see *ante*, p. 181.

[3] *Ante*, pp. 18, 19.

[4] *Khodabhai Mahiji* v. *Bahdhar Dala* (1882), 6 Bom. 541; "Vyavahara Mayukha," chap. iv. s. viii. para. 14. See also "Smriti Chandrika," chap. xi. s. i. para. 3; s. ii. paras. 12–15.

[5] *Post*, pp. 412, 413; *Russoobai* v. *Zoolekhabai* (1895), 19 Bom. 707; *Rakhmabai* v. *Tukaram* (1886), 11 Bom. 47; *Kesserbai* v. *Valab Raoji* (1879), 4 Bom. 188, at p. 208.

[6] See *Muttammal* v. *Vengalakshmiammal* (1882), 5 Mad. 32; *Kumaravelu* v. *Virana Goundan* (1879), 5 Mad. 29; *Mari* v. *Chinnammal* (1884), 8 Mad. 107, at pp. 117, 127, 129; *post*, pp. 413, 414.

[7] *Joti Lal* (*Lala*) v. *Durani Kower* (*Mussamat*) (1864), B. L. R. F. B. R. 67; W. R. F. B. R. 173; *Tahaldai Kumri* v. *Gaya Pershad Sahu* (1909), 37 Calc. 214; 14 C. W. N. 443; *Rama Nand* v. *Surgiani* (1894), 16 All. 221; *Muttammal* v. *Vengalakshmiammal* (1882), 5 Mad. 32, approving of *Kumaravelu* v. *Virana Goundan* (1879), 5 Mad. 29; *Ramasami* v. *Narasamma* (1884), 8 Mad. 133; *Mari* v. *Chinnammal* (1884), 8 Mad. 107; *Seethai* v. *Nachiar* (1912), 37 Mad. 286; *Sundarmani Dei* v. *Gokulanand Chowdhury* (1912), 18 C. W. N. 160; *Kesserbai* v. *Valab Raoji* (1879), 4 Bom. 188, at p. 208.

[8] "Mitakshara," chap. ii. s. iii. para. 2.

[9] "Mitakshara," chap. ii. s. v. para. 1; *Burhum Deo Ray* v. *Punchoo Roy* (1865), 2 W. R. C. R. 123.

[10] "Mitakshara," chap. ii. s. iv. paras. 5, 6; *Anant Singh* (*Thakur*) v. *Durga Singh* (*Thakur*) (1910), 37 I. A. 191; 32 All. 363; 14 C W. N. 770; 12 Bom. L. R. 504; *Samat* v. *Amra* (1882), 6 Bom. 394, at p. 397; *Krishnaji Vyanktesh* v. *Pandurang* (1875), 12 Bomb. H. C. 65; *Parmappa* v. *Shiddappa* (1906), 30 Bom. 607; 8 Bom. L. R. 685.

The "Mayukha"[1] places the sons of brothers of the whole blood after their fathers, and[2] declares that brothers of the half blood share with the paternal grandfather.[3]

"If there be a competition between whole brothers associated and whole brothers unassociated, and between half brothers associated and half brothers unassociated, the former exclude the latter."[4]

"The reunited half brother and the separated whole brother take the estate in equal shares."[5]

As to whether in the case of the remarriage of a widow,[6] or the marriage of a woman after divorce,[7] there is any relationship between the sons of the different marriages, *quære*.[8] It is submitted that there is none, except perhaps where the remarriage is authorized by local or caste custom.[9]

As to sisters, see *post*, pp. 392, 393.

Brothers' sons.

10. Brothers' sons.[10]

According to the "Mitakshara" and the "Mayukha," sons of brothers of the whole blood are preferred to sons of brothers of the half blood[11] (an undivided member of each class being preferred to a divided member),[12] and according to the latter authority sons of brothers of the half blood are postponed until after the father's brother.[13]

According to the "Mayukha," sons of brothers who are dead share along with surviving brothers, but this rule does not go beyond brothers and brothers' children.[14]

The brother's son ends what is generally known as the "compact series" of heirs according to the "Mitakshara."[15]

In the case of a competition between *sapindas* not enumerated in the

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1 Chap. iv. s. viii. para. 16; *Samat* v. *Amra* (1882), 6 Bom. 394, at p. 397.

2 Chap. iv. s. viii. para. 20.

3 See *post*, p. 394.

4 Sarvadhikari's "Law of Inheritance," p. 921 (see also p. 922). See *Sham Narain* v. *Court of Wards* (1873), 20 W. R. C. R. 197, at pp. 200, 201; "Mitakshara," chap. ii. s. ix. para. 7.

5 Sarvadhikari's "Law of Inheritance," p. 922; "Mitakshara," chap. ii. s. ix. para. 7; see *post*, pp. 414, 415.

6 *Ante*, pp. 37, 369, 370.

7 *Ante*, pp. 63, 64.

8 *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 345.

9 *Ante*, p. 37.

10 "Mitakshara," chap. ii. s. iv. para. 7; "Vyavahara Mayukha," chap. iv. s. viii. para. 17; "Viramitrodaya" (G. C. Sarkar's translation), p. 195.

11 *Samat* v. *Amra* (1882), 6 Bom. 394, at p. 397; "Mitakshara," chap. ii. s. iv. paras. 5–7.

12 See Sarvadhikari's "Hindu Law of Inheritance," pp. 927, 928.

13 Chap. iv. s. viii. paras. 16, 18, 20.

14 *Chandika Bakhsh* v. *Muna Kuar* (1902), 29 I. A. 70; 24 All. 273; 6 C. W. N. 425; 4 Bom. L. R. 376; "Vyavahara Mayukha," chap. iv. s. viii. para. 17.

15 Chap. ii. s. v. para. 2; *Mohandas* v. *Krishnabai* (1881), 5 Bom. 597, at p. 602.

texts, preference should be given to the *sapinda* belonging to the nearer line.[1]

Brother's son's son.

11. Brother's son's son.[2]

The list of *gotraja sapindas* in the "Mitakshara" is apparently not exhaustive.[3] It is now settled that the proper place of the brother's son's son is next after the brother's son.[4]

Relationship of half blood.

According to the Bombay authorities, neither the "Mitakshara" nor the "Mayukha" makes any distinctions between relations of the whole blood and relations of the half blood, except in the case of brothers and sons of brothers,[5] but the Allahabad High Court [6] has held that the distinction between the whole and the half blood extends to the descendants of the grandfather, it may be to the fourteenth degree, but certainly to the case before them. In that case a grandson of a half brother of the great grandfather of the propositus was postponed to a grandson of a whole brother of such great grandfather. Sastri G. C. Sarkar [7] says: "The preference based upon connection by whole blood, applies to all collateral relations of equal degree; propinquity being the principle of the order of succession, a relation of the full blood by reason of his propinquity excludes a relation of the same degree who is of the half blood."

It is quite clear that a *sapinda* of the half blood is preferred to a more distant *sapinda* of the whole blood.[8]

Sister and sister's son.

The other descendants of the father, namely the sister [9] and the sister's

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[1] *Chinnasami Pillai* v. *Kunja Pillai* (1911), 35 Mad. 152.

[2] *Kalian Rai* v. *Ram Chandar* (1910), 24 All. 128. "As a deceased person's own great grandson inherits before his parents, so it may not be unreasonable to hold that his father's great grandson inherits before his grandfather," Bhattacharya's "Hindu Law," 2nd ed., p. 444. The great grandson of the grandfather was preferred to the grandson of the great grandfather in *Buddha Singh* v. *Laltu Singh* (1915), 42 I. A. 208; 37 All. 604; 20 C. W. N. 1; 17 Bom. L. R. 1022. See "Vyavastha Chandrika," vol. i. p. 178, note †. Varadaraja (Burnell's translation, p. 36) admits him after the brother's son. In the table of succession, compiled by Mr. Rama Row, at p. 115 of Cunningham's Digest, a brother's son's son is placed after a brother's son. The spiritual principle would give him this place (see *ante*, pp. 377, 378), Sarvadhikari's "Law of Inheritance," p. 467. *Oorhya Kooer (Mussamut)* v. *Rajoo Nye Sookool* (1870), 14 W. R. C. R. 208; *Kureem Chand Gurain* v. *Odung Gurain* (1866), 6 W R. C. R. 158.

[3] See *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 433.

[4] *Buddha Singh* v. *Laltu Singh* (1915), 42 I. A. 208; 37 All. 604; 20 C. W. N. 1; 17 Bom. L. R. 1022.

[5] *Samat* v. *Amra* (1882), 6 Bom. 394, at p. 397; *Vithalrao Krishna Vinchurkar* v. *Ramrao Krishna Vinchurkar* (1899), 24 Bom. 317; 2 Bom. L. R. 139. See *Saguna* v. *Sadashiv* (1902), 26 Bom. 710, at p. 715; 4 Bom. L. R. 527. As to a mother's half brother, see *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83, at p. 91; 19 Mad. 405, at p. 410.

[6] *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215.

[7] "Hindu Law," 3rd ed., p. 259.

[8] *Muthuswami Mudaliyar* v. *Salambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83, at p. 91; 19 Mad. 405, at p. 410; *Ganga Sahai* v. *Kesri* (1915), 42 I. A. 177; 37 All. 545; 19 C. W. N. 1175; 17 Bom. L. R. 998; S. C. in Court below, *Kesri* v. *Ganga Sahai* (1910), 32 All. 541.

[9] *Jullessur Kooer* v. *Uggur Roy* (1882), 9 Calc. 725; 12 C. L. R. 460; *Jagat Narain* v. *Sheo Das*

son, do not come in at this point under the Mitakshara school, as they are not *gotraja sapindas*. The sister's son succeeds as a *bandhu*.[1] As to the rights of a sister in Bombay and Madras, see *post*, pp. 410, 411, 413.

Grandparents of the Deceased and their Descendants to the Third Degree.

12. Father's mother.[2]

Grandmother.

After the brother's son the remaining *gotraja* heirs are only dealt with in the following paragraphs of the "Mitakshara." Chap. ii. s. v. para. 4; "Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." Para. 5: "On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family and who are *sapindas*." [3]

This enumeration is not exhaustive.[4] The "Subodhini" [5] commenting on the words of the "Mitakshara," "On failure of the paternal grandfather's line, the paternal great grandmother, the great grandfather, his sons and their issue inherit," carries the enumeration a little further, viz. "the paternal great grandfather's mother, great grandfather's father, great grandfather's brothers and their sons. The paternal great grandfather's grandmother, great grandfather's grandfather, great grandfather's uncles and their sons."

In the Bombay Presidency the sister is placed between the father's mother and the father's father.[6]

13. Father's father.[7]

Grandfather.

According to the "Mayukha" [8] he takes equally with the half-brother.

14. Father's brother.[9]

Paternal uncle.

(1883), 5 All. 311. The question was raised but not decided in *Goolab Sing (Kooer)* v. *Kurun Sing (Rao)* (1871), 14 M. I. A. 176, at p. 194; 10 B. L. R. 1, at p. 8.

[1] *Post*, p. 402.

[2] *Gandhi Maganlal* v. *Jadab (Bai)* (1899), 24 Bom. 192, at p. 212; 1 Bom. L. R. 574; *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 432; "Mitakshara," chap. ii. s. v. para. 2; "Vyavahara Mayukha," chap. iv. s. viii. para. 8.

[3] See *ante*, p. 378, note 3.

[4] *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 433.

[5] (A commentary on the "Mitakshara" composed in the thirteenth century by Bishveshar Bhatta; Bhattacharya's "Hindu Law," 2nd ed., 33.) Chap. ii. s. 5, para. 5; Colebrooke's note to "Mitakshara," chap. ii. s. v. para. 5; *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 433.

[6] "Vyavahara Mayukha," chap. iv. s. viii. para. 19; *post*, pp. 410, 411.

[7] "Mitakshara," chap. ii. s. v. paras. 4, 5; "Vyavahara Mayukha," chap. iv. s. viii. para. 20.

[8] Chap. iv. s. viii. para. 20; *ante*, p. 391.

[9] "Mitakshara," chap. ii. s. v. para. 2. As to the preference of those of the whole blood, see *ante*, p. 392.

According to the "Mayukha,"[1] the paternal great grandfather, the father's brother and the sons of the half-brother share the inheritance.

An uncle of the full blood is preferred to an uncle of the half blood.[2]

His son. 15. Father's brother's son.

His grandson. 16. Father's brother's son's son.[3]

The reasons which place the brother's son's son before the father's mother, would place the father's brother's son's son in this position.

Great Grandparents of the Deceased and their Descendants to the Third Degree.

Great grandmother. 17. Father's father's mother.[4]

Great grandfather. 18. Father's father's father.[5]

His son. 19. Father's father's brother.[6]

His grandson. 20. Father's father's brother's son.[7]

His great grandson. 21. Father's father's brother's son's son.[8]

REMOTE SAPINDA HEIRS.

Descendants of Deceased from the Fourth to the Sixth Degree.

Grandson's grandson. 22. Son's son's son's son.[9]

His son. 23. Son's son's son's son's son.[10]

His grandson. 24. Son's son's son's son's son's son.[11]

Descendants of Father of Deceased from the Fourth to the Sixth Degree.

Brother's great grandson. 25. Brother's son's son's son.[12]

His son. 26. Brother's son's son's son's son.[13]

His grandson. 27. Brother's son's son's son's son's son.[14]

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[1] Chap. iv. s. viii. para. 20.

[2] *Ganga Sahai* v. *Kesri* (1915), 42 I. A. 177; 37 All. 545; 19 C. W. N. 1175; 7 Bom. L. R. 998; *ante*, p. 392.

[3] *Buddha Singh* v. *Laltu Singh* (1915), 42 I. A. 208; 37 All. 604; 20 C. W. N. 1; 17 Bom. L. R. 1022; S. C. in Court below, (1912), 34 All. 663. Cunningham's "Digest of Hindu Law," p. 115; Sarvadhikari's "Law of Inheritance," p. 654; *Kashibai* v. *Moreshvar Raghunath* (1911), 35 Bom. 389; 13 Bom. L. R. 352.

[4] "Mitakshara," chap. ii. s. v. para. 5; *ante*, p. 393.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.; Ganesh* v. *Waghu* (1903), 27 Bom. 610; 5 Bom. L. R. 581.

[8] *Duroo Sing* v. *Rai Sing*, S. D. A. N. W. P. (1864), p. 521. See *ante*, p. 393.

[9] *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 373; 5 B. L. R. 293; 14 W. R. P. C. 1. It is scarcely possible that so remote a descendant would be born at the time of the death of the propositus.

[10] *Ibid.*

[11] *Ibid.*

[12] *Venilal* v. *Parjaram* (1894), 20 Bom. 173. See *ante*, p. 393.

[13] See *ante*, p. 393.

[14] *Ibid.*

Descendants of Grandfather of Deceased from Fourth to Sixth Degree.

28. Father's brother's son's son's son. Uncle's great grandson.
29. Father's brother's son's son's son's son.[1] His son.
30. Father's brother's son's son's son's son's son.[2] His grandson.

Descendants of Great Grandfather of Deceased from Fourth to Sixth Degree.

31. Father's father's brother's son's son's son. Great uncle's son's grandson.
32. Father's father's brother's son's son's son's son. His son.
33. Father's father's brother's son's son's son's son's son. His grandson.

Ancestors of Deceased in the Fourth Degree and their Descendants to the Third Degree.[3]

34. Father's father's father's mother. Grandfather's grandmother.
35. Father's father's father's father. Grandfather's grandfather.
36. Father's father's father's father's son. His son.
37. Father's father's father's father's son's son. His grandson.
38. Father's father's father's father's son's son's son. His great grandson.

Ancestors of Deceased in Fifth Degree and their Descendants to the Third Degree.[4]

39. Father's father's father's father's mother. Grandfather's grandfather's mother.
40. Father's father's father's father's father. Grandfather's great grandfather.
41. Father's father's father's father's father's son. His son.
42. Father's father's father's father's father's son's son. His grandson.
43. Father's father's father's father's father's son's son's son.[5] His great grandson.

Ancestors of Deceased in Sixth Degree, and their Descendants to the Third Degree.[6]

44. Father's father's father's father's father's mother. Great grandfather's great grandmother.
45. Father's father's father's father's father's father. Great grandfather's great grandfather.
46. Father's father's father's father's father's father's son. His son.
47. Father's father's father's father's father's father's son's son. His grandson.

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[1] See, however, Sarkar's "Hindu Law," 3rd ed., 262.

[2] *Ibid.*

[3] *Ante*, p. 381.

[4] *Ibid.*

[5] *Jeebnath Singh (Thakoor)* v. *Court of Wards* (1875), 2 I. A. 163; 15 B. L. R. 190; 23 W. R. C. R. 409; S. C. in court below (1870), 5 B. L. R. 442; 14 W. R. P. C. 117.

[6] *Ante*, p. 381.

His great grandson.

48. Father's father's father's father's father's father's son's son's son.

Descendants from Fourth to Sixth Degree of Ancestors in Fourth Degree.

Grandfather's grandfather's grandson's grandson. His son. His grandson.

49. Father's father's father's father's son's son's son's son.

50. Father's father's father's father's son's son's son's son's son.

51. Father's father's father's father's son's son's son's son's son's son.

Descendants from Fourth to Sixth Degree of Ancestors in Fifth Degree.

Grandfather's great grandfather's grandson's grandson. His son. His grandson.

52. Father's father's father's father's father's son's son's son's son.

53. Father's father's father's father's father's son's son's son's son's son.[1]

54. Father's father's father's father's father's son's son's son's son's son's son.

Descendants from Fourth to Sixth Degree of Ancestors in Sixth Degree.

Great grandfather's great grandfather's grandson's grandson. His son. His grandson.

55. Father's father's father's father's father's father's son's son's son's son.

56. Father's father's father's father's father's father's son's son's son's son's son.

57. Father's father's father's father's father's father's son's son's son's son's son's son.

"Smriti Chandrika."

The "Smriti Chandrika"[2] gives the following order of succession of *sapindas* after a brother's son:—

I. The son of the grandfather.
II. His son.
III. The son of the great grandfather.
IV. His son.
V. The son of the great great grandfather.
VI. His son.
VII. The son of the father of the great great grandfather.
VIII. His son.

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[1] *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 373; 5 B. L. R. 293; 14 W. R. P. C. 1.

[2] Chap. xi. s. v. paras. 8–12, and summary.

IX. The son of the last *sapinda*.
X. His son.

As pointed out by Mr. Mayne,[1] no other writer has followed this list. It has had no support from the Courts.

SAMANODAKAS.

Failing all *gotraja sapindas* the inheritance passes to what are called the *samanodakas*.[2] Those are all agnates beyond the degree of *sapinda*. Samanodal

"The order of succession," amongst the *samanodakas*, "appears to be governed by two principles, namely—

"(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

"(2) Amongst the descendants of the same ancestor the nearer excludes the more remote." [3]

In the case of *samanodakas* it is not possible to apply the test of religious efficacy.[4]

The following order of succession of *samanodakas* is given by Sir Henry Cunningham in his "Digest of Hindu Law" [5] :—

1. Seven generations from the grandson's grandson's son's son exclusive.
2. Seven generations from the brother's son's son's son's son's son exclusive.
3. Seven generations from the father's brother's son's son's son's son's son exclusive.
4. Seven generations from the father's father's brother's son's son's son's son's son exclusive.
5. Seven generations from the father's father's father's father's son's son's son's son's son's son exclusive.
6. Seven generations from the father's father's father's father's father's son's son's son's son's son's son.
7. Seven generations from the father's father's father's father's father's father's son's son's son's son's son's son.
8. Mother of father's father's father's father's father's father.
9. Father's father's father's father's father's father's father.
10. His male descendants up to thirteen generations.
11. Mother of father's father's father's father's father's father's father.
12. Father's father's father's father's father's father's father's father.
13. His male descendants up to thirteen generations.

Similarly up to thirteenth grandfather exclusive.

BANDHUS.

Failing all *sagotra sapindas* and *samanodakas*,[6] the inheritance according to the Mitakshara system passes to the cognate *Bandhus.*

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[1] "Hindu Law," 8th ed., p. 804.

[2] See *ante*, pp. 379, 380.

[3] G. C. Sarkar's "Hindu Law," 3rd ed., p. 262; R. K. Sarvadhikari's "Law of Inheritance," p. 687. See Colebrooke's note to "Mitakshara," chap. ii. s. v. para. 5.

[4] *Suba Singh* v. *Sarafraz Kunwar* (1896), 19 All. 215, at p. 232.

[5] Pp. 117, 118.

[6] *Jeebnath Singh (Thakoor)* v. *Courts of Wards* (1875), 2 I. A. 163;

sapindas, who are called *bandhus* or *bhinnagotra sapindas*, *i.e.* "springing from a different family, and connected by common corporeal particles, or by consanguinity,"[1] through females.[2]

With the exception of the daughter's son, who succeeds under special texts,[3] no cognate can succeed while there is any agnate down to the last *samanodaka* alive and capable of taking.[4]

Inheritance of *bandhus*.

The difficulty in laying down any definite rules as to the inheritance of *bandhus* arises from the lack of information in the "Mitakshara" on the subject. Chapter II. Section VI., para. 1, which contains all that is said in the Mitakshara with regard to what *bandhus* inherit, is as follows :—

1. "On failure of Gentiles, the cognates are heirs. Cognates are of three kinds; related to person himself, to his father, or to his mother as is declared by the following text. 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'"[5]

This enumeration is only illustrative and is not exhaustive.[6]

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15 B. L. R. 190; 23 W. R. C. R. 409; *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 373; 5 B. L. R. 293; 14 W. R. P. C. 1; *Naraini Kuar* v. *Chandi Din* (1886), 9 All. 467; *Digdayi (Musst.)* v. *Bhatan Lall* (1869), 5 B. L. R. 448, note; 11 W. R. C. R. 300; "Mitakshara," chap. ii. s. vi. para. 1.

[1] *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 343.

[2] *Muttusami* v. *Muttukumarasami* (1892), 16 Mad. 23.

[3] *Ante*, p. 389.

[4] *Naraini Kuar* v. *Chandi Din* (1886), 9 All. 467; *Ram Singh (Bhyah)* v. *Ugur Singh (Bhyah)* (1870), 13 M. I. A. 373, at p. 390; 5 B. L. R. 293, at p. 302; 14 W. R. P. C. 1, at p. 3. See *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (1839), 2 M. I. A. 133 (a Mithila case); *Goolab Sing (Kooer)* v. *Rao Kurun Sing* (1871), 14 M. I. A. 176; 10 B. L. R. 1.

[5] See *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28, at p. 37; 10 W. R. F. B. 76, at p. 77.

[6] *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448; 1 B. L. R. P. C. 44; 10 W. R. P. C. 31; *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83; 19 Mad. 405; *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28; 10 W. R. F. B. 76; *Umaid Bahadur* v. *Udoi Chand* (1880), 6 Calc. 119; 6 C. L. R. 500; *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 344; *Ratnasubbu Chetti* v. *Ponnappa Chetti* (1882), 5 Mad. 69.

The following propositions have been laid down by Pundit Rajkumar Sarvadhikari [1] :—

" I. A *bandhu* is a cognate *sapinda* within four degrees counting (1) from the deceased himself, in ascent or descent ; (2) from any one of the four immediate ancestors of the deceased." [2]

Bandhus who inherit.

" II. The right of inheritance accrues to a *bandhu* if the late owner and the person claiming the heritable right were related as *sapindas* to each other, either directly through themselves or through their mothers or fathers.

Sapinda relationship must be mutual.

" In other words, a heritable *bandhu* is a cognate *sapinda* within four degrees, counting from—

" 1. The deceased in ascent or descent.

" 2. Deceased's paternal ancestor within four degrees.

" 3. Deceased's maternal ancestor within four degrees.

" 4. Deceased's father's maternal ancestor within four degrees.

" 5. Deceased's mother's maternal ancestor within four degrees.

" N.B.—The word 'five' is to be substituted for 'four' in the case of father's *bandhus*. If the deceased or his ancestor be related through father's mother, then *five* degrees instead of four should be counted in both directions. Thus grandson's daughter's grandson is related to the deceased (or his paternal ancestor) through father's mother."

" III. Rule of exclusion :—

Rule of exclusion.

" 1. The cognate descendant of each of these classes is excluded from inheritance when (i.) the deceased or (ii.) the deceased's ancestor does not belong to—

" (*a*) His maternal grandfather's line.

" (*b*) His father's ditto.

" (*c*) His mother's ditto.

" 2. Cognate ascendant of the deceased is excluded from inheritance when he does not belong to—

" (*a*) The deceased's maternal grandfather's line.

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[1] "Hindu Law of Inheritance," pp. 703–707.

[2] The word "ancestors" includes here : (1) ancestors of the deceased *ex parte paternâ* ; (2) ancestors of the deceased *ex parte maternâ* ; (3) ancestors of the father of the deceased *ex parte maternâ* ; (4) ancestors of the mother of the deceased *ex parte maternâ*. *Ibid.*, p. 704.

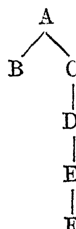
"(b) The deceased's father's ditto.[1]

"(c) The deceased's mother's ditto."

Sapinda relationship must be mutual.

A *sapinda* to be capable of inheriting must be so related to the late owner, that the late owner was also his *sapinda* either directly or through his father or mother, or in other words the *sapinda* relationship must be mutual.[2]

Among *gotraja sapindas*, sapindaship is always mutual, but this is not always the case amongst *bandhus*. In *Umaid Bahadur* v. *Udoi Chand* [3] we find the following: Take for illustration:—



"A is the common ancestor, B, his son, is the propositus. C, a daughter of A; D, her daughter, both dead; E is the son of D and has a son F. Now B and E are *sapindas* to each other, but not B and F. Although F is" B's *sapinda* being "within six degrees of the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother," is not F's *sapinda*, and therefore, "they are not *sapindas* to each other; but B being a *sapinda* of E through his mother they are *sapindas* of each other."

Kinds of bandhus.

Bandhus are of three kinds, taking the inheritance in order, viz. :—

(a) The cognate kindred of the deceased. These are called *Atma bandhus*.

(b) His father's cognate kindred. These are called *Pitri bandhus*.

(c) His mother's cognate kindred.[4] These are called *Matri bandhus*.

These classes cannot be added to.[5]

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[1] As to the father's maternal grandfather's line, see *post*, p. 408.

[2] *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 I. A. 290; 42 Calc. 384; 18 C. W. N. 1154; 16 Bom. L. R. 863; *Babu Lal* v. *Nanku Ram* (1894), 22 Calc. 339, at p. 344; *Umaid Bahadur* v. *Udoi Chand* (1880), 6 Calc. 119, at pp. 127, 128; 6 C. L. R. 500, at p. 515; *Shib Sahai* v. *Saraswati* (1915), 37 All. 583, where it was held that a grandfather's great grandson's daughter's son was not a *bandhu*.

[3] (1880), 6 Calc. 119; 6 C. L. R. 500.

[4] "Mitakshara," chap. ii. s. vi. para. 2.

[5] *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1914), 41 I. A. 290; 42 Calc. 384; 18 C. W. N. 1154; 16 Bom. L. R. 863.

Some of these *bandhus* included in the Mitakshara system are not heirs according to the Bengal system.[1]

I. All *atma bandhus* precede *pitri bandhus*, and all *pitri bandhus* precede *matri bandhus*.[2] Order of succession.

II. In each of these classes as between cognates related through the father of the deceased and those connected through his mother, preference is given to those related through his father.[3]

III. Subject to the above, the nearer line excludes the more remote.[4]

Thus the son of a sister's son comes before the son of a maternal uncle.[5]

IV. Subject to the above rules preference is to be given to the claimant, between whom and the stem there intervenes one female link, to that claimant who is separated from the stem by two such links.[6]

Thus a daughter's son's son will be preferred to a daughter's daughter's son.[7]

This ground of distinction in favour of a person will not apply when he competes with one of a nearer line.[8]

The intervention of two females in the line of inheritance is not a bar.[9]

The following order of succession is in the main to be found in Dr. Jogendranath Bhattacharya's "Hindu Law,"[10] and Pundit Rajkumar Sarvadhikari's "Hindu Law of Inheritance."[11]

The decision in *Muttusami* v. *Muttukumarasami*[12] points out instances

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[1] See Mayne's "Hindu Law," 8th ed., pp. 716–718.

[2] "Mitakshara," chap. ii. s. vi. para. 2; *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami* (1896), 23 I. A. 83; 19 Mad. 405; *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1910), 33 Mad. 539.

[3] *Sundrammal* v. *Rangasami Mudaliar* (1894), 18 Mad. 193.

[4] *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342; *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115; *Muttusami* v. *Muttukumarasami* (1892), 16 Mad. 23, at p. 30 (affirmed on appeal (1896), 23 I. A. 83; 19 Mad. 405).

[5] *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342.

[6] *Tirumalachariar* v. *Andal Ammal* (1907), 30 Mad. 406.

[7] *Ibid.*

[8] *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115.

[9] *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (1894), 19 Bom. 631, at p. 634; *Umaid Bahadur* v. *Udoi Chand* (1880), 6 Calc. 119; 6 C. L. R. 500; *Venkatagiri* v. *Chandru* (1899), 23 Mad. 123; *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115.

[10] 2nd ed., pp. 460–462.

[11] Pp. 707 *et seq*

[12] (1892), 16 Mad. 23; affirmed on appeal (1896), 23 I. A. 83; 19 Mad. 405.

in which that order is inconsistent with the "Mitakshara," but the lists given by those authors are most valuable and complete.

In regard to the succession of cognates, there is no difference between the rules laid down in the "Mitakshara" and the "Mayukha."[1]

Order of inheritance. *Atma bandhus.*

Atma bandhus are (1) related through daughters of the family, (2) related through the mother of the deceased.

The former class come first. Of them the descendants of the deceased are preferred.

We have seen that the daughter's son, although a *bandhu*, has a special place among the *gotraja sapindas.*[2]

Following the above rules, the order of inheritance is as follows :—

Sons of Daughters of the Family.

Sons of daughters of the family.

1. The son's daughter's son.
2. The son's son's daughter's son.
3. Sister's son.[3]

The *bandhus* of the deceased connected with him through his father have preference over those connected through his mother.[4]

A step-sister's son is entitled to inherit.[5]

4. Brother's daughter's son.[6]
5. Brother's son's daughter's son.
6. Father's father's daughter's son.[7]
7. Father's father's son's daughter's son.
8. Father's father's son's son's daughter's son.

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[1] *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (1894), 19 Bom. 631.

[2] *Ante*, p. 389.

[3] *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28; 10 W. R. F. B. 76; *Chelikani Tirupati Rayaningaru* v. *Vencata Gopala Narasimha Rau Bahadur* (*Rajah Suraneni*) (1871), 6 Mad. H. C. 278; *Srinivasa Ayyangar* v. *Rengasami Ayyangar* (1879), 2 Mad. 304; *Raghunath Kuari* v. *Munnan Misr* (1897), 20 All. 191; *Naraini Kuar* v. *Chandi Din* (1886), 9 All. 467; *Lakshmanammal* v. *Tiruvengada Mudali* (1882), 5 Mad. 241. For a history of the vindication of the right of a sister's son to succeed as a *bandhu*, see Mayne's "Hindu Law," 8th ed., pp. 806–810. The question was treated as an open one in *Kurun Sing* (*Rao*) v. *Mahomed Fyz Ali Khan* (*Nawab*) (1871), 14 M. I. A. 187, at p. 195; 10 B. L. R. P. C. 7, at pp. 9, 10.

[4] *Saguna* v. *Sadashiv* (1902), 26 Bom. 710, at p. 715; 4 Bom. L. R. 527.

[5] *Subbaraya* v. *Kylasa* (1891), 15 Mad. 300; *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 33 (new edition, 29); see *ante*, pp. 392, 393.

[6] *Doorga Bibee Mussamut* v. *Janaki Pershad* (1872), 10 B. L. R. 341; 18 W. R. C. R. 331.

[7] "Mitakshara," chap. ii. s. vi. para. 1; *ante*, p. 398; *Tahaldai Kumri* v. *Gaya Pershad Sahu* (1909), 37 Calc. 214; 14 C. W. N. 443.

According to both Dr. Jogendranath Bhattacharya,[1] and Pundit Rajkumar Sarvadhikari,[2] the great grandfather's daughter's son[3] will next succeed as an *atma bandhu*, but he is described in the "Mitakshara" as a *pitri bandhu*,[4] and has therefore been held to be such.[5] It would follow that the great grandfather's son's daughter's son,[6] the great grandfather's son's son's daughter's son,[7] the great great grandfather's daughter's son,[8] and his son's daughter's son[9] and son's son's daughter's son[10] cannot be classed as *atma bandhus* although they are so classed by those two authors.

Sons of Daughter's Sons of the Family.

Next come, according to Dr. Jogendranath Bhattacharya[11] and Pundit Rajkumar Sarvadhikari,[12] those of the *atma bandhus ex parte paternâ* to whom the deceased was a *pitri bandhu*, viz.— **Sons of daughter's sons of the family.**

9. Daughter's son's son[13] and
10. Son's daughter's son's son.

Here Pundit Rajkumar Sarvadhikari inserts the son's son's daughter's son's son.[14]

11. Father's daughter's son's son.[15]

The sister's son's son's son is not an heir.[16]

12. Brother's daughter's son's son.
13. Father's father's daughter's son's son.
14. Father's father's son's daughter's son's son.

The above two learned authors also include here the following, viz. the great grandfather's daughter's son's son,[17] the great grandfather's son's daughter's son's son,[18] the great great grandfather's daughter's son's son,[19]

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1 "Hindu Law," 2nd ed., p. 460.
2 "Hindu Law of Inheritance," p. 713.
3 *Post*, p. 407.
4 *Ante*, p. 398.
5 *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83; 19 Mad. 405; S. C. in court below (1892), 16 Mad. 23; *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115.
6 *Post*, p. 407.
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 "Hindu Law," 2nd ed., p. 460.
12 "Hindu Law of Inheritance," p. 714.
13 *Tirumalachariar* v. *Andal Ammal* (1907), 30 Mad. 406; *Krishnayya* v. *Pichamma* (1887), 11 Mad. 287; *Sheobarat Kuari* v. *Bhagwati Prasad* (1895), 17 All. 523.
14 "Hindu Law of Inheritance," p. 714.
15 *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342.
16 *Lowji* v. *Mithabai* (1900), 2 Bom. L. R. 842.
17 *Post*, p. 407.
18 *Ibid.*
19 *Ibid.*

and great great grandfather's son's daughter's son's son,[1] but having regard to what has been held with regard to the great grandfather's daughter's son,[2] it seems to be impossible to place these among the *atma bandhus*.

Sons of Daughter's Daughters of the Family.

Sons of daughter's daughters of the family.

Next come, according to Dr. Jogendranath Bhattacharya [3] and Pundit Rajkumar Sarvadhikari,[4] those of the *atma bandhus ex parte paternâ* to whom the deceased was *matri bandhu*, viz.—

15. Daughter's daughter's son.[5]
16. Son's daughter's daughter's son.
17. Father's daughter's daughter's son.[6]
18. Father's son's daughter's daughter's son.
19. Grandfather's daughter's daughter's son.[7]
20. Grandfather's son's daughter's daughter's son.

The last-named authors also include in the same class the following, viz. great grandfather's daughter's daughter's son,[8] great grandfather's son's daughter's daughter's son,[9] the great great grandfather's daughter's daughter's son,[10] and the great great grandfather's son's daughter's daughter's son,[11] but having regard to what has been held with regard to the great grandfather's daughter's son, it seems impossible to place these among the *atma bandhus*.

Atma bandhus ex parte maternâ.

We now come to the *atma bandhus ex parte maternâ.*

21. Mother's father.[12]

To whom deceased was *atma bandhu ex parte paternâ.*

Then come first those to whom the deceased is *atma bandhu ex parte paternâ,* viz.—

22. Mother's brother.[13]

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[1] *Post*, p. 407.

[2] *Ante*, p. 403.

[3] "Hindu Law," 2nd ed., p. 460.

[4] "Hindu Law of Inheritance," p. 714.

[5] *Tirumalachariar* v. *Andal Ammal* (1907), 30 Mad. 406; *Ajudhia* v. *Ram Sumer Misir* (1909), 31 All. 454; *Ramphal Thakur* v. *Pan Mati Padain* (1910), 32 All. 640.

[6] *Umaid Bahadur* v. *Udoi Chand* (1880). 6 Calc. 119; 6 C. L. R. 500.

[7] *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (1894), 19 Bom. 631; *Venkatagiri* v. *Chandru* (1899), 23 Mad. 123; *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 115.

[8] *Post*, p. 407.

[9] *Post*, p. 407.

[10] *Ibid.*

[11] *Ibid.*

[12] *Chinnammal* v. *Venkatachala* (1891), 15 Mad. 421.

[13] *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83; 19 Mad. 405; "Viramatrodaya" (G. C. Sarkar's translation), p. 200, referred to in *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448, at pp. 466, 467; 1 B. L. R. P. C. 44, at pp. 52, 53; 10 W. R. P. C. 31, at p. 34; *Saguna* v. *Sadashiv* (1902), 26 Bom. 710; 4 Bom. L. R. 527; *Narasimma* v. *Mangammal* (1889), 13 Mad. 10; *Mohandas* v. *Krishnabai* (1881), 5 Bom. 597.

23. Mother's brother's son.[1]

In a Jain case (*Appandai Vathiyar* v. *Bagubali Mudaliyar* (1910), 33 Mad. 439) the Madras High Court on the authority of the "Smriti Chandrika" (*ante*, p. 17), chap. xi. s. 5, para. 15, the "Sarasvati Vilasa" (*ante*, p. 18), para. 595, and the Vyavahara Mayukha (*ante*, pp. 18, 19), chap. iv. s. 9, para. 22, preferred the mother's sister's son to the mother's brother's son. The question depends upon whether the persons named in those texts and in the above para. of the "Mitakshara" (*ante*, p. 398), take in the order named therein. The Allahabad High Court has differed from the Madras High Court, *Ram Charan Lal* v. *Rahim Baksh* (1916), 38 All. 416. This last decision is, it is submitted, to be preferred.

24. Mother's brother's son's son.
(25. Mother's father's father.[2])
26. Mother's father's brother.
27. Mother's father's brother's son.
28. Mother's father's brother's son's son.[3]
(29. Mother's grandfather's father.)
30. Mother's grandfather's brother.
31. Mother's grandfather's brother's son.
32. Mother's grandfather's brother's son's son.

Dr. Jogendranath Bhattacharya [4] adds here the great great grandson of the mother's father, mother's father's father and mother's father's father's father in order. These are placed by Pundit Rajkumar Sarvadhikari [5] after the maternal grandfather's grandson's daughter's son.[6]

To whom deceased was *atma bandhu ex parte maternâ*.

Then come *atma bandhus ex parte maternâ* to whom the propositus was *atma bandhu ex parte maternâ*.

They are all daughter's sons.

33. The mother's sister's son.[7]
34. The maternal grandfather's son's daughter's son.

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[1] "Mitakshara," chap. ii. s. vi., para. 1; *ante*, p. 398; *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342. It was held in *Ram Charan Lal* v. *Rahim Baksh* (1916), 38 All. 416, that the mother's brother's son came before the mother's sister's son.

[2] See *Krishnayya* v. *Pichamma* (1887), 11 Mad. 287.

[3] *Ratnasubbu Chetti* v. *Ponnappa Chetti* (1882), 5 Mad. 69.

[4] "Hindu Law," 2nd ed., p. 460.

[5] "Hindu Law of Inheritance," p. 716.

[6] *Post*, p. 406.

[7] *Gunesh Chunder Roy* v. *Nil Komul Roy* (1874), 22 W. R. C. R. 264; *Chamanlal Maganlal (Sha)* v. *Doshi Ganesh Motichand* (1904), 28 Bom. 453; 6 Bom. L. R. 460; see *Mohandas* v. *Krishnabai* (1881), 5 Bom. 597; *Appandai Vathiyar* v. *Bagubali Mudaliyar* (1910), 33 Mad. 439; *Ram Charan Lal* v. *Rahim Baksh* (1916), 38 All. 416; above, note 1.

35. The maternal grandfather's son's son's daughter's son.

Then, according to Pundit Rajkumar Sarvadhikari, come—

36. Maternal grandfather's great great grandson.

37. Maternal great grandfather's great great grandson.

38. Maternal great great grandfather's great great grandson.

As to Dr. Jogendranath Bhattacharya's view, see *ante*, p. 405.

Then, according to Dr. Jogendranath Bhattacharya [1] and Pundit Rajkumar Sarvadhikari,[2] follow in the same class the daughter's son, son's daughter's son and son's son's daughter's son of the maternal great grandfather,[3] and the daughter's son, son's daughter's son and son's son's daughter's son of the maternal great great grandfather,[4] but as the first of these is mentioned in the "Mitakshara" as a *matri bandhu* [5] it follows that the subsequent ones also are *matri bandhus.*

To whom deceased was *pitri bandhu.*

Then come the *atma bandhus ex parte maternâ* to whom the deceased was *pitri bandhu.*

They are all sons of daughter's sons.

39. Mother's sister's son's son.[6]

The Patna High Court [7] has postponed the mother's sister's son's son to the daughter's son of the maternal great grandfather, but the latter is described in the "Mitakshara" [8] as a *matri bandhu*, and should therefore, it is submitted, not be preferable to the former, who is an *atma bandhu.*[9]

40. Mother's brother's daughter's son's son.

Then follow in the same class, according to Dr. Jogendrânath Bhattacharya [10] and Pundit Rajkumar Sarvadhikari,[11] daughter's son's sons,[12] and son's daughter's son's sons [13] of the maternal great grandfather, and the daughter's son's son,[14] and the son's daughter's son's son [15] of the maternal great great grandfather. As the maternal great grandfather's daughter's son is mentioned in the "Mitakshara" as a *matri bandhu*,[16] it follows that his son, and consequently those following his son, are not *atma bandhus.*

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[1] "Hindu Law," 2nd ed., p. 460.

[2] "Hindu Law of Inheritance," p. 716.

[3] *Post*, p. 409.

[4] *Ibid.*

[5] *Ante*, p. 398.

[6] *Vijli (Bai)* v. *Prabhalakshmi (Bai)* (1907), 9 Bom. L. R. 1129.

[7] *Adit Narayan Singh* v. *Mahabir Prosad Tewari* (1916), 1 Patna L. J. 324; 21 C. W. N. [1917, Pat. 12].

[8] Chap. II., sec. 6.

[9] Cf. *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83; 19 Mad. 405.

[10] "Hindu Law," 2nd ed., p. 460.

[11] "Hindu Law of Inheritance," p. 716.

[12] *Post*, p. 409.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ante*, p. 398.

Then follow the *atma bandhus ex parte maternâ* to whom the deceased was *matri bandhu*.

To whom deceased was *matri bandhu.*

These are sons of daughters' daughters.

41. Mother's sister's daughter's son.
42. Mother's brother's daughter's daughter's son.

Then follow in the same class, according to Dr. Jogendranath Bhattacharya [1] and Pundit Rajkumar Sarvadhikari,[2] the daughter's daughter's son and son's daughter's daughter's son of the maternal great grandfather, and of the maternal great great grandfather,[3] but as the son of the maternal great grandfather's daughter is classed as a *matri bandhu*,[4] it is apparent that the daughter's daughter's son of such maternal great grandfather and the others cannot be classed as *atma bandhus*.

We next come to the *pitri bandhus*. The list will apparently commence with those already referred to,[5] viz.—

Pitri bandhus.

43. Great grandfather's daughter's son.[6]
44. Great grandfather's son's daughter's son.[7]
45. Great grandfather's son's son's daughter's son.
46. Great great grandfather's daughter's son.
47. Great great grandfather's son's daughter's son.
48. Great great grandfather's son's son's daughter's son.[8]
49. Great grandfather's daughter's son's son.[9]
50. Great grandfather's son's daughter's son's son.
51. Great great grandfather's daughter's son's son.
52. Great great grandfather's son's daughter's son's son.
53. Great grandfather's daughter's daughter's son.
54. Great grandfather's son's daughter's daughter's son.
55. Great great grandfather's daughter's daughter's son.
56. Great great grandfather's son's daughter's daughter's son.

Then follow the *pitri bandhus* to whom the deceased was *atma bandhu ex parte paternâ*.

Those to whom deceased was *atma bandhu ex parte paternâ.*

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1 "Hindu Law," 2nd ed., p. 461.

2 "Hindu Law of Inheritance," p. 716.

3 *Post*, p. 409.

4 *Ante*, p. 398.

5 *Ante*, p. 403.

6 *Ante*, p. 398. "Mitakshara," chap. ii. s. vi. para. 1; *Muthuswami Mudaliyar* v. *Sunambedu Muthukumaraswami Mudaliyar* (1896), 23 I. A. 83; 19 Mad. 405; S. C. in court below (1892), 16 Mad. 23. See *Krishna Ayyangar* v. *Venkatarama Ayyangar* (1905), 29 Mad. 615.

7 See *K. Kissen Lala* v. *Javallah Prasad Lala* (1867), 2 Mad. H. C. 346; *Parmanandas* v. *Parbhudas* (1912), 14 Bom. L. R. 1630.

8 *Manik Chand Golecha* v. *Jagat Settani Prankumari Bibi* (1889), 17 Calc. 518.

9 *Sethurama* v. *Ponnammal* (1888), 12 Mad. 155; *Chamanlal Maganlal (Sha)* v. *Doshi Ganesh Motichand* (1904), 28 Bom. 453; 6 Bom. L. R. 460.

57–59. The son,[1] grandson, and great grandson of the father's maternal grandfather.

60–62. The son, grandson, and great grandson of the father's maternal great grandfather.

63–65. The son, grandson, and great grandson of the father's maternal great great grandfather.

At this point Dr. Jogendranath Bhattacharya [2] puts in the great great grandson of the father's three maternal ancestors in order, but according to Pundit Rajkumar Sarvadhikari [3] they would apparently come after the grandson's daughter's son of the father's maternal great great grandfather.[4]

Those to whom deceased was *atma bandhu ex parte maternâ.*

Then follow the *pitri bandhus* to whom the deceased was *atma bandhu ex parte maternâ.*

66–68. The daughter's son, the son's daughter's son, and the grandson's daughter's son of the father's maternal grandfather.

69–71. The daughter's son, the son's daughter's son, and the grandson's daughter's son of the father's maternal great grandfather.

72–74. The daughter's son, the son's daughter's son, and the grandson's daughter's son of the father's maternal great great grandfather.

75, 76, 77. Great great grandson of father's mother's father, of his father, and of his grandfather.

Those to whom deceased was *pitri bandhu.*

Now come the *pitri bandhus* to whom the deceased was *pitri bandhu*, viz.—

78, 79. Daughter's grandson, and son's daughter's grandson of the father's maternal grandfather.

80, 81. Daughter's grandson and son's daughter's grandson of the father's maternal great grandfather.

Those to whom deceased was *matri bandhu.*

Then come the *pitri bandhus* to whom the deceased was *matri bandhu*, viz.—

82, 83. Daughter's daughter's son and son's daughter's daughter's son of the father's maternal grandfather.

84, 85. Daughter's daughter's son and son's daughter's daughter's son of the father's maternal great grandfather.

Matri bandhus.

Then come the *matri bandhus*. They apparently commence with those who have been before referred to,[5] viz.—

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[1] *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448; 1 B. L. R. P. C. 45; 10 W. R. P. C. 31.

[2] "Hindu Law," 2nd ed., p. 461.

[3] "Hindu Law of Inheritance," p. 717.

[4] See below.

[5] *Ante*, p. 406.

86–88. The daughter's son, son's daughter's son, and son's son's daughter's son of the maternal great grandfather.

See, however, *Adit Narayan* v. *Mahabir Prosad Tewari* (1916), 1 Patna L. J. 324; 21 C. W. N. [1917, Pat.] 12, *ante*, p. 406.

89–91. The daughter's son, son's daughter's son, and son's son's daughter's son of the maternal great great grandfather.

92, 93. The daughter's son's son, and son's daughter's son's son of the maternal great grandfather.

94, 95. The daughter's son's son and son's daughter's son's son of the maternal great great grandfather.

96, 97. The daughter's daughter's son and son's daughter's daughter's son of the maternal great grandfather.

98, 99. The daughter's daughter's son and son's daughter's daughter's son of the maternal great great grandfather.

Those to whom the deceased was *pitri bandhu ex parte paternâ.*

Then come the *matri bandhus* to whom the deceased was *pitri bandhu ex parte paternâ*, viz.—

100–103. The mother's maternal grandfather, his son, grandson,[1] and great grandson.

104–107. The mother's maternal great grandfather, his son, grandson, and great grandson.

Here Dr. Jogendranath Bhattacharya [2] places the great great grandson of the mother's maternal grandfather and great grandfather, but according to Pundit Rajkumar Sarvadhikari [3] they will apparently come after the daughter's son of the mother's maternal great grandfather.[4]

Those to whom deceased was *atma bandhu ex parte maternâ.*

Then come the *matri bandhus* to whom the deceased was *atma bandhu ex parte maternâ*, viz.—

108–110. The daughter's son,[5] the son's daughter's son, and the grandson's daughter's son of the mother's maternal grandfather.

111–113. The daughter's son, the son's daughter's son, and the grandson's daughter's son of the mother's maternal great grandfather.

Then apparently follow [6]—

114, 115. The great great grandson of the mother's maternal grandfather and great grandfather.

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[1] "Mitakshara," chap. ii. s. vi. para. 1; *ante*, p. 398.

[2] "Hindu Law," 2nd ed., p. 461.

[3] "Hindu Law of Inheritance," p. 717.

[4] Below.

[5] "Mitakshara," chap. ii. s. vi. para. 1.

[6] Above.

Those to whom deceased was *pitri bandhu.*

Then follow the *matri bandhus* to whom the deceased was *pitri bandhu*, viz.—

116, 117. The daughter's grandson, and son's daughter's grandson of the mother's maternal grandfather.

118, 119. The daughter's grandson and son's daughter's grandson of the mother's maternal great grandfather.

Those to whom deceased was *matri bandhu.*

Then follow the *matri bandhus* to whom the deceased was *matri bandhu*, viz.—

120, 121. The daughter's daughter's son, and son's daughter's daughter's son of the mother's maternal grandfather.[1]

121, 123. The daughter's daughter's son, and son's daughter's daughter's son of the mother's maternal great grandfather.

Female Heirs in Bombay.

Sister in Bombay Presidency.

In the Bombay Presidency a sister is treated as a *gotraja sapinda*,[2] and inherits after the paternal grandmother and before the paternal grandfather, whether the case be governed by the "Mitakshara"[3] or by the "Mayukha,"[4] except where there is an invariable and ancient custom to the contrary.[5]

She comes before a half-brother,[6] and after a brother's son.[7] In cases governed by the "Mitakshara," where the competition is between her and a half-brother's son,[8] the latter is entitled to preference over her as heir,[9] but it would be otherwise in cases governed purely by the "Vyavahara Mayukha."[10]

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[1] As to these, however, see Ghose's "Hindu Law," 2nd ed., p. 152; see *ante*, p. 400.

[2] In *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 421, West, J., says: "It seems to me that he (Nilakantha in the 'Vyavahara Mayukha') introduces her rather on the ground of *sapindaship* than of *gotraship*, but calls to his aid a quibbling play, upon the term '*gotra*' as a make-weight." See *Gandhi Maganlal* v. *Jadab* (*Bai*) (1899), 24 Bom. 192, at p. 213; 1 Bom. L. R. 574.

[3] *Bhagwan Vithoba* v. *Warubai* (1908), 32 Bom. 300; 10 Bom. L. R. 389.

[4] "Vyavahara Mayukha," chap. iv. s. viii. para. 19; *Venayeck Anundrow* v. *Luxumeebaee* (1864), 9 M. I. A. 520; 3 W. R. P. C. 41; S. C. in court below (1861), 1 Bom. H. C. 117; *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353.

[5] *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353.

[6] *Ibid.*

[7] *Mulji Purshotum* v. *Cursandas Natha* (1900), 24 Bom. 563; 2 Bom. L. R. 721.

[8] *Ante*, p. 391.

[9] *Bhagwan Vithoba* v. *Warubai* (1908), 32 Bom. 300; 10 Bom. L. R. 389; *Hari* v. *Vasudev* (1914), 38 Bom. 438; 16 Bom. L. R. 283.

[10] *Bhagwan Vithoba* v. *Warubai* (1908), 32 Bom. 300; 10 Bom. L. R. 389; *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353.

She comes before a father's brother's son [1] or his son,[2] a stepmother,[3] a brother's widow,[4] an uncle's widow,[5] or a more remote male relative.[6]

The fact that another heir has intervened between the last male holder and the sister does not exclude the right of the sister.[7]

Sisters of the half blood.

Half-sisters apparently succeed after half-brothers.[8]

They take before a stepmother, a paternal uncle,[9] or a paternal uncle's widow.[10]

An unendowed sister has no prior right over an endowed sister, such as an unendowed daughter has over an endowed daughter.[11]

In the Bombay Presidency sisters take absolute estates in severalty, and not as joint tenants.[12]

Other females born in the family.

The position of other females born in the family is by no means clear.

It is argued that the text of the "Mayukha," [13] which supports the right of the sister on the ground that "Being begotten in her brother's family (*gotra*) she possesses the qualifications of a *gotraja*," can be applied by parity of reasoning to the daughters of all *gotraja sapindas*, but the right of a sister is expressed,[14] and with the exception of a daughter and sister no female born in the family is placed among the *gotraja sapindas*.[15] There is some authority [16] that they are heirs. In one case [17] the father's half-sister was preferred to the mother's brother. There is no authority showing their exact position (if any) amongst the *bandhus*. In the absence of custom they should be placed, it is submitted, after all the *bandhus* who have been enumerated. As the Hindu law does not favour an escheat, something may be said for this arrangement. In one case referred to in West and Bühler's "Hindu Law," [18] the sastris preferred the brother's daughters to their sons. In another case a daughter's daughter was treated as an heir.[19]

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[1] *Venayeck Anundrow* v. *Luxumeebaee* (1864), 9 M. I. A. 520; 3 W. R. P. C. 41; *Lakshmi* v. *Dada Nanaji* (1879), 4 Bom. 210.

[2] *Biru* v. *Khandu* (1879), 4 Bom. 214.

[3] *Lakshmi* v. *Dada Nanaji* (1879), 4 Bom. 210.

[4] *Rudrapa* v. *Irava* (1903), 28 Bom. 82; 5 Bom. L. R. 676.

[5] *Mahantapa* v. *Nilgangawa* (1879), 3 Bom. 368, note.

[6] *Dhondu Gurav* v. *Gangabai* (1879), 3 Bom. 369.

[7] *Ibid.*

[8] West and Bühler (2nd ed., p. 186) place them immediately after whole sisters, see Mayne's "Hindu Law," 8th ed., p. 743; but this would, in cases governed by the "Mayukha," place them before half-brothers (above).

[9] *Trikam Purshottam* v. *Natha Daji* (1911), 36 Bom. 120; 13 Bom. L. R. 863.

[10] *Kesserbai* v. *Valab Raoji* (1879), 4 Bom. 188.

[11] *Bhagirthibai* v. *Baya* (1881), 5 Bom. 264.

[12] *Rindabai* v. *Anacharya* (1890), 15 Bom. 206.

[13] Chap. iv. s. viii. para. 19.

[14] See *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 446.

[15] See *Ganesh* v. *Waghu* (1903), 27 Bom. 610; 5 Bom. L. R. 581; *Venilal* v. *Parjaram* (1894), 20 Bom. 173.

[16] See *Madhavram* v. *Dave Trambaklal* (1896), 21 Bom. 739, at p. 744 (as to niece and grandniece); *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at p. 446; *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662, at p. 672.

[17] *Saguna* v. *Sadashiv Pandu* (1902), 26 Bom. 710; 4 Bom. L. R. 527

[18] 2nd ed., p. 207.

[19] *Gangaram* v. *Ballia Vithoba*, Bom. P. J. 1876, p. 31.

Widows of *sapindas*.

In the Bombay Presidency the widows of *gotraja sapindas*[1] and of *samanodakas*[2] are held to be heirs.

Subject to the preferential rights of the persons enumerated in what is called the compact series of heirs,[3] they take in the place occupied by their husbands, but immediately after all the male *gotrajas* who belong to the line[4] to which their respective husbands belonged.[5]

"We think that the preponderance of reason is in favour of holding that the females in each line of *gotrajas* are excluded by any males existing in that line, within the limits to which *gotraja* relationship extends."[6] Thus the sons of a paternal uncle inherit in preference to the widow of another paternal uncle of the deceased,[7] and the paternal uncle's son's son is preferred to a paternal uncle's widow.[8] The brother's widow comes before a grandson of a paternal uncle.[9]

They take even if their husbands are disqualified from taking.[10]

The right of these widows must be mainly rested on the ground of positive acceptance and usage.[11] It does not extend to widows of *bandhus*.[12]

The rights of the following have been declared by the Courts, viz. the son's widow[13] (whom Balambhatta places immediately after the paternal

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1 *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, at pp. 444, 445; S. C. affirmed on appeal, *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212; 5 Bom. 110; 7 C. L. R. 445. See cases below, notes 5 and 6.

2 *Lakshmibai* v. *Jayram Hari* (1869), 6 Bom. H. C. A. C. 152.

3 *I.e.* the list of heirs ending with the brother's sons. "Mitakshara," chap. ii. s. v. para. 2 (*ante*, p. 391); "Vyavahara Mayukha," chap. iv. s. viii. para. 18; *Mohandas* v. *Krishnabai* (1881), 5 Bom. 597, at p. 602; *Nahalchand Harakchand* v. *Hemchand* (1884), 9 Bom. 31, at p. 34.

4 *I.e.* the widows of males in the paternal grandfather's line come after males in the same line, and similarly in the paternal great grandfather's line, and the paternal great great grandfather's line the males are preferred, see *Rachava* v. *Kalingapa* (1892), 16 Bom. 716, at pp. 719, 720; *Kashibai* v. *Moreshvar Raghunath* (1911), 35 Bom. 389; 13 Bom. L. R. 552; *Ambaidas* v. *Jijibhai* (1912), 14 Bom. L. R. 261 (a Mayukha case).

5 *Lallubhai Bapubhai* v. *Mankuvarbai* (1876), 2 Bom. 388, as explained by *Rachava* v. *Kalingapa* (1892), 16 Bom. 716; *Nahalchand Harakchand* v. *Hemchand* (1884), 9 Bom. 31; *Russoobai* v. *Zoolekhabai* (1895), 19 Bom. 707; *Venkapa* v. *Holyawa* (1873), 9 Bom. 34, note; *Sita Ram* v. *Chintaman* (1902), 24 All. 472, at p. 474.

6 *Rachava* v. *Kalingapa* (1892), 16 Bom. 716, at p. 719.

7 *Ibid.*

8 *Kashibai* v. *Moreshvar Raghunath* (1911), 35 Bom. 389; 13 Bom. L. R. 552; *Ranchod Naran* v. *Ajoobai* (1907), 9 Bom. L. R. 1149.

9 *Khandacharya* v. *Govindacharya* (1911), 13 Bom. L. R. 1005.

10 *Gangu* v. *Chandrabhagabai* (1907), 32 Bom. 275; 10 Bom. L. R. 149.

11 *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212, at p. 237; 5 Bom. 110, at p. 124; 7 C. L. R. 445, at p. 453; S. C. in Court below (1876), 2 Bom. 388.

12 *Vallabhdas Jamnadas* v. *Sakarbai* (1900), 25 Bom. 281; 2 Bom. L. R. 343.

13 *Roopchund Tilukchund* v. *Phoolchund Dhurmchund* (1824), 2 Borr. 616; *Jetha* (*Bai*) v. *Haribai*, Bom. P. J. 38 of 1872. She is excluded by a brother or brother's son, *Vithal Raghunath* v. *Haribayee* (1871), 9 Bom. 34, note; *Venkapa* v. *Holyawa*

grandmother), the stepmother,[1] brother's widow,[2] brother's son's widow,[3] the widow of a paternal first cousin,[4] and a paternal uncle's widow.[5]

As to the estate taken by such widows, see *post*, p. 464

Female Heirs in Madras.

Although it has been held[6] that in the Madras Presidency women do not take unless they are expressly named in the text-books, the Madras High Court has treated certain female relatives as *bandhus*, on the ground that "any relative who is also a cognate may be treated as coming within the definition of *bhinna gotra sapinda*, and that the term '*sapinda*' as used in chap. ii. s. vi. of the 'Mitakshara' included females."[7] It places them, however, after all male *bandhus*.[8]

Female heirs in Madras.

On the above principle the following have been held to be heirs, viz. sister,[9] half sister,[10] son's daughter,[11] daughter's daughter,[12] father's sister,[13] brother's daughter.[14]

(1873), *Ibid.*; but takes before a paternal first cousin, *Vithaldas Manickdas* v. *Jeshubai* (1879), 4 Bom. 219.

[1] *Kesserbai* v. *Valab Raoji* (1879), 4 Bom. 188, at p. 208. She comes before the widow of a half-brother, *Rakhmabai* v. *Tukaram* (1886), 11 Bom. 47, and before a paternal uncle's son, *Russoobai* v. *Zoolekhabai* (1895), 19 Bom. 707.

[2] *Khandacharya* v. *Govindacharya* (1911), 13 Bom. L. R. 1005. She is excluded by a daughter, *Sita Ram* v. *Chintaman* (1902), 24 All. 472, and by a brother's son, even if he be separated, *Nahalchand Harakchand* v. *Hemchand* (1884), 9 Bom. 31. She comes before a paternal uncle's son, *Basangavda* v. *Basangavda* (1914), 39 Bom. 87; 16 Bom. L. R. 699. As to the widow of an undivided brother, see *Manjappa Hegade* v. *Lakshmi* (1890), 15 Bom. 234.

[3] *Madhavram Mugatram* v. *Dave Trambaklal Bhawanishankar* (1896), 21 Bom. 739.

[4] *Lulloobhoy Bappoobhoy* v. *Cassibai* (1880), 7 I. A. 212; 5 Bom. 110; 7 C. L. R. 445.

[5] *Kashibai* v. *Moreshvar Raghunath* (1911), 35 Bom. 389; 13 Bom. L. R. 552.

[6] *Ante*, p. 366.

[7] *Balamma* v. *Pullayya* (1894), 18 Mad. 168, at p. 170; *Kutti Ammal* v. *Radakristna Aiyan* (1875), 8 Mad. H. C. 88; *Venkatasubramaniam Chetti* v. *Thayarammah* (1898), 21 Mad. 263, at p. 267.

[8] *Venkata Narasimha Appa Rao Bahadur (Rajah)* v. *Venkata Purushothama Jagannadha Gopala Row Bahadur (Rajah Surenani)* (1908), 31 Mad. 321. See *Vellanki Venkata Krishna Row (Rajah)* v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1, at p. 8; 1 Mad. 174, at p. 185; 26 W. R. C. R. 21, at p. 22.

[9] *Kutti Ammal* v. *Radakristna Aiyan* (1875), 8 Mad. H. C. 88. Her claim is inferior to that of her son, *Lakshmanammal* v. *Tiruvengada Mudali* (1882), 5 Mad. 241.

[10] *Kumaravelu* v. *Virana Goundan* (1879), 5 Mad. 29.

[11] *Nallanna* v. *Ponnal* (1890), 14 Mad. 149.

[12] *Ramappa Udayan* v. *Arumugath Udayan* (1893), 17 Mad. 182. As to sister's daughter, see *Sundrammal* v. *Rangasami Mudaliar* (1894), 18 Mad. 193.

[13] *Chinnammal* v. *Venkatachala* (1891), 15 Mad. 421. See *Narasimha* v. *Mangammal* (1889), 13 Mad. 10.

[14] *Venkatasubramaniam Chetti* v. *Thayarammah* (1898), 21 Mad. 263.

Earlier decisions negatived the claims of these women to be heirs,[1] and Mr. Mayne [2] gives excellent reasons for doubting the soundness of the decisions of the Madras High Court. So far as the "Mitakshara," which is the paramount authority in the Madras Presidency, is concerned, the construction put upon it by the other High Courts [3] seems the right one, and there is not in Madras, as in Bombay,[4] an express text of a local authority or a custom to support the view.

The Madras system does not admit the wives of *gotraja sapindas* as heirs.[5]

Inheritance on Reunion.

Inheritance on reunion.

Both under the Mitakshara and Bengal systems of law there are special rules for the inheritance in case of reunion after partition.[6]

According to the Bengal school "the reason for inheritance by a reunited coparcener is not spiritual benefit, but a quasi-contractual relation and affection for each other." [7]

Reunited brothers.

A reunited brother of the whole blood has precedence over a non-reunited brother of the whole blood, and a reunited brother of the half-blood has precedence over a non-reunited brother of the half-blood, *i.e.* relationship being equal, the succession is regulated by union. A reunited brother of the half-blood shares equally with a non-reunited brother of the whole blood. A whole brother reunited excludes a half-brother reunited, *i.e.* union being equal, superior relationship rules the succession.[8]

Descendants.

Where there has been a reunion, properly so called,[9] and where the descendants of the persons reuniting continue to be

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[1] See cases cited in Norton's Leading Cases, 531.

[2] "Hindu Law," 8th ed., pp. 748–753.

[3] *Ante*, p. 366.

[4] *Ante*, pp. 410, 411.

[5] *Balamma* v. *Pullaya* (1894), 18 Mad. 168; *Kanakammal* v. *Ananthamathi Ammal* (1912), 37 Mad. 293.

[6] See *ante*, pp. 359, 360.

[7] *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (1908), 35 Calc. 721, at p. 726; 12 C. W. N. 511, at p. 514.

[8] "Mitakshara," chap. ii. s. ix. paras. 5–13; "Daya-Bhaga," chap. xi. s. v. paras. 13–39; "Vyavahara Mayukha," chap. iv. s. ix. paras. 5. 13; "Vivada Chintamani" (P. C. Tagore's translation), p. 308; *Ramasami* v. *Venkatesam* (1892), 16 Mad. 440; *Tara Chand Ghose* v. *Pudum Lochun Ghose* (1866), 5 W. R. C. R. 249; *Sham Narain* v. *Court of Wards* (1873), 20 W. R. C. R. 197; *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1867), 7 W. R. C. R. 35; *Raj Kishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27, at p. 35; 24 W. R. 234, at p. 236.

[9] *Ante*, pp. 359, 360.

members of the reunited family, the law of inheritance applicable is the same as in the case of the death of any of those between whom the reunion took place.[1]

The "Smriti Chandrika" lays down further rules for the succession in case of reunion.[2] According to the "Viramitrodaya,"[3] after the reunited brothers of the half-blood, or brothers of the full blood, come the father or paternal uncle if reunited, then half-brothers not reunited, then the father not reunited, then the mother, and then the widow. Then comes the sister, and, failing her, the unassociated *sapindas*.

Hermits and Members of Religious Orders.

The Hindu law has made special rules as to the succession to the property of a hermit (*Vanaprastha*), an ascetic (*Sannyasi* or *Joti*),[4] or a professed religious student (*Bramachari*) belonging to the three religious orders into which the twice-born classes may enter. The property of the first would go to a spiritual brother, associated in holiness, *i.e.* belonging to the same hermitage, that of the second to a virtuous pupil (disciple),[5] and that of the third to his religious preceptor.[6] On failure of these, "any one associated in holiness takes the goods." [7]

Inheritance to hermits, etc.

This principle is based entirely upon fellowship and personal association, and a stranger, though of the same order, is excluded.[8] As these persons would rarely possess private property of any substance, the rules are not of great importance. There must be a real and not a fictitious or incomplete renunciation of worldly affairs to render these rules applicable.[9]

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[1] *Abhai Churn Jana* v. *Mangal Jana* (1892), 19 Calc. 634.

[2] Chap. xii. paras. 23–29; "Viramitrodaya" (G. C. Sarkar's translation), p. 214.

[3] (G. C. Sarkar's translation), pp. 214–216.

[4] It is doubtful whether a *Bairagi* can be classed as a *Sannyasi*, *Ramdas Gopaldas* (*Sadhu*) v. *Baldevdas Kanshalyadasji* (1914), 39 Bom. 168; 16 Bom. L. R. 757. A custom that the preceptor's preceptor succeeded was proved in *Collector of Dacca* v. *Jagat Chunder Goswami* (1901), 28 Calc. 608; 5 C. W. N. 873.

[5] See *Dukharam Bharti* v. *Luchmun Bharti* (1879), 4 Calc. 954; 4 C. L. R. 49; *Sheoprokash Doss* (*Mohunt*) v. *Joyram Doss* (*Mohunt*) (1866), 5 W. R. M. R. 57; *Ram Dass* v. *Gunga Dass* (1862), 3 Agra, 295; *Ramdas Gopaldas* (*Sadhu*) v. *Baldevdasji Kaushalyadasji* (1914), 39 Bom. 168; 16 Bom. L. R. 757. This does not apply to the chela of a mohunt, *Ramdhan Puri* (*Gossain*) v. *Dalmir Puri* (*Gossain*) (1909), 14 C. W. N. 191. A pupil, who had left his master, would have no rights, *Soogun Chund* v. *Gopal Gir* (1872), 4 N. W. P. 101.

[6] See *Chhaju Gir* v. *Diwan* (1906), 29 All. 109.

[7] "Mitakshara," chap. ii. s. viii. paras. 1–6; "Daya-Bhaga," chap. xi. s. vi. paras. 35, 36. See *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1887), 10 Mad. 375, at p. 384.

[8] *Khuggender Narain Chowdhry* v. *Sharupgir Oghorenath* (1878), 4 Calc. 543.

[9] See *Mudhoobun Dass* (*Mohunt*) v. *Hurey Kishen Bhunj*, Ben. S. D. A.

In the case of *sannyasis* a pupil has no right of inheritance until the performance of the final ceremony which severs him from his family.[1]

These rules have no application to Sudras,[2] unless some usage be proved to the contrary, as they cannot become *jotis* or *sannyasis*.[3]

As to the widow of a *garbhari gosavi*, see *Gitabai* v. *Shivbakas* (1903), 5 Bom. L. R. 318.

The property of an endowment would necessarily follow the rules of succession in force in the particular endowment.[4]

As to the succession to the private property of a mohunt, see *Ramdhan Puri (Gossain)* v. *Dalmir Puri (Gossain)* (1909), 14 C. W. N. 191.

Escheat.

Escheat.

On failure of all these heirs the King, as represented by the Secretary of State, takes by way of escheat.[5]

It may be a question whether in the case of Brahmins the King does not take the property by way of trust for other Brahmins.[6] The ancient texts provided in the case of Brahmins for the succession of the spiritual preceptor, pupil, fellow student in the Vedas, and lastly the Brahmins of the same village, endowed with learning in the three Vedas and other qualities.[7] It is difficult, however, to see how the Government would be bound by a trust of so vague a character.

There is no right of escheat in favour of a zemindar.[8]

The burden is upon the Government to show the absence of heirs.[9]

When the Government takes, it takes like any other heir, *i.e.* subject to all legal charges,[10] but not subject to unauthorized alienations.[11]

As to the superintendence of escheats, see Bengal Regulation XIX. of 1810, s. 7, and Madras Regulation VII. of 1817, s. 6.

1852, p. 1089; *Khoodeeram Chatterjee* v. *Rookhinee Boistobee* (1871), 15 W. R. C. R. 197; *Gouri Sunker Byas* v. *Niader Sing* (1913), 18 C. W. N. 59.

[1] *Ramdhan Puri (Gossain)* v. *Dalmir Pari (Gossain)* (1909), 14 C. W. N. 191.

[2] *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai* (1898), 22 Mad. 302.

[3] *Harish Chandra Roy* v. *Atir Mahmud* (1913), 40 Calc. 545; 17 C. W. N. 517.

[4] *Post*, pp. 568–572.

[5] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1860), 8 M. I. A. 500; 2 W. R. P. C. 59; "Mitakshara," chap. ii. s. vii. para. 6; "Daya-Bhaga," chap. xi. s. vi. para. 27.

[6] *Ibid.*

[7] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 38; 13 W. R. F. B. 49, at p. 59; *Jugdanund Gossamee* v. *Kessub Nund Gossamee*, W. R. 1864, C. R. 146; "Vyavastha Darpana" (2nd ed.), 308; "Vyavastha Chandrika," pp. 198–200; "Mitakshara," chap. ii. s. vii. paras. 1–4; "Daya-Bhaga," chap. xi. s. vi. para. 26.

[8] *Sonet Kowar (Ranee)* v. *Himmut Bahadoor (Mirza)* (1876), 3 I. A. 92; 1 Calc. 391.

[9] *Gridhari Lall Roy* v. *Bengal Government* (1868), 12 M. I. A. 448; 1 B. L. R. P. C. 44; 10 W. R. P. C. 31.

[10] *Collector of Masulipatum* v. *Cavaly Vencata Narrainapah* (1860), 8 M. I. A. 500, at p. 528; 2 W. R. P. C. 59, at p. 61; *Cavaly Vencata Narrainapah* v. *Collector of Masulipatam* (1867), 11 M. I. A. 619; 10 W. R. P. C. 47.

[11] *Post*, p. 514.

CHAPTER XII.

INHERITANCE TO MALES ACCORDING TO THE BENGAL SCHOOL.

THE law of inheritance, according to the Bengal school, is founded upon the principle of spiritual benefit.[1] Founded on spiritual benefit.

"The heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased."[2]

The theory of spiritual benefit is not, however, in every case the guiding principle.[3] As in the case of the Mitakshara school[4] succession has in most cases been fixed by the texts of ancient writers.

"In most cases propinquity, spiritual efficacy, and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines Jimutavahana[5] was compelled to ignore spiritual efficacy and had recourse to other principles or express texts."[6]

"The succession of females, according to Hindu law, is quite exceptional, and is not founded upon the ordinary rule, viz. that of spiritual benefit. It is true that in the case of the widow, she confers some spiritual benefit, but if that were the sole test, she would have ranked much lower than she does now. Daughters confer no benefit, but they succeed because their sons do."[7] Succession of females.

The principles of the Bengal system of inheritance, so far as they depend upon spiritual efficacy, are derived from the rules which have been laid down for the performance of the Meaning of "*sapinda*."

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[1] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15; 13 W. R. F. B. 49; *Kedar Nath Banerjee* v. *Hari Das Ghose* (1915), 43 Calc. 1; 19 C. W. N. 1181.

[2] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. vol. 47, at p. 64; 9 B. L. R. 377, at p. 394; 18 W. R. C. R. 359, at p. 364.

[3] See Sarkar's "Hindu Law," 3rd ed., pp. 288, 289; *Toolsey Dass Seal* v. *Luckhymoney Dassee (Sm.)* (1900), 4 C. W. N. 743.

[4] *Ante*, p. 376.

[5] The author of the "Daya-Bhaga," the leading treatise of the Bengal school. See *ante*, pp. 14, 15.

[6] *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (1908), 35 Calc. 721, at p. 726; 12 C. W. N. 511, at p. 514.

[7] *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (1874), 22 W. R. C. R. 393, at pp. 394, 395.

Parvana Sradh[1] (ceremony of veneration) in honour of ancestors. In the course of such ceremonies the performer of the *sradh* offers a *pinda* or funeral cake, or, as it is called, an undivided oblation to his father, his father's father, and his father's father's father,[2] and also to his mother's father, his mother's father's father, and his mother's father's father's father.[3]

He thus becomes the *sapinda* or sharer in the funeral cake,[4] not only of each one of the persons to whom he offers a cake, but also, secondly, of each person who on his death would at a similar ceremony offer a cake to his *manes,* and also, thirdly, of each person who offers a cake to any of the persons to whom he is bound to offer a cake.[5]

"Since the father and certain other ancestors partake of three funeral oblations as participating in the offering at obsequies, and since the son and other descendants to the number of three present oblations to the deceased (or to be shared by his *manes*); and he, who while living presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person; therefore, such being the case, the middlemost of seven, who, while living, offered food to the *manes* of ancestors, and when dead partook of offerings made to them, became the object to which the oblations of his descendants were addressed in their lifetime, and shares with them, when they are deceased, the food which must be offered by the daughter's son and other descendants beyond the third degree. Hence, those ancestors to whom he presented oblations, and those descendants who present oblations to him, partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who partake of such offerings are *sapindas.*" [6]

Classes of *pindas.*

Pindas are of three descriptions in the following order of superiority [7]:—

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[1] For a complete description of the ceremonies performed, see Colebrooke's "Miscellaneous Essays," vol. ii. p. 166, and R. K. Sarvadhikari's "Hindu Law of Inheritance," pp. 57, 94–100. The *parvana sradh,* at which two sets of oblations are offered, is to be distinguished from the *ekoddishta sradh* which is in honour of a single ancestor.

[2] "Manu," chap. iii. para. 216.

[3] These last were not included in Manu, but were added by Yajnavalkya, the law-giver, who promulgated his code towards the middle of the first century, A.D.; Rajkumar Sarvadhikari's "Law of Inheritance," pp. 58, 59. See *Balusami Pandithar* v. *Narayana Rau* (1897), 20 Mad. 342.

[4] See Wilson's "Glossary," p. 465.

[5] *Amrita Kumari Debi* v. *Lakhi Narayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28, at p. 32; S. C. *Omrit Koomaree Dabee* v. *Luckee Narain Chuckerbutty,* 10 W. R. F. B. 76, at p. 81.

[6] "Daya-Bhaga," chap. xi. s. i. para. 38; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at pp. 39, 40; 13 W. R. F. B. 49, at pp. 59, 60.

[7] R. K. Sarvadhikari's "Law of Inheritance," pp. 817, 818,

1. Those presented directly to the deceased.

2. Those offered to his three paternal ancestors and participated in by him.

"That the *pindas* offered to paternal ancestors are primary, and those offered to maternal ancestors are secondary in importance, and that there is a difference between the efficacy of the two classes of *pindas* is not only laid down in distinct terms by Jagannath,[1] but is to be well deduced from Rughunundun's 'Sraddha Tattwa.'"[2]

3. Those which he was bound to offer to his three maternal ancestors.

"Although the deceased has no right of participation in the oblations presented to his maternal ancestors, still, inasmuch as the three immediate maternal ancestors received oblations from him, and the agnate and cognate descendants of each offered *pindas* which the deceased was bound to give, there is thus a heritable bond between him and his maternal kinsmen."[3]

In each of these three classes *pindas* presented by agnate descendants of a common ancestor are preferred to *pindas* presented by cognate descendants of such ancestor.[4]

After offering these *pindas* or cakes the performer wipes his hand with *kusa* grass, and offers the wipings or crumbs of the cakes (*lepa*)—which are spoken of as divided offerings—to the three next highest paternal ancestors. He thus, upon similar principles, becomes what is called a *sakulya*, not only *Sakulyas.* of such ancestors, but also of such of his descendants as would offer the *lepa* to him, and of such persons who offer the *lepa* to an individual to whom he offers the *lepa*.

He is also the *sakulya* of persons who offer a *lepa* to an individual to whom he offers a *pinda*, and of persons who offer a *pinda* to an individual to whom he offers the *lepa*.

He then offers libations of water to the *manes* of seven *Samanodak* additional generations of paternal ancestors. The persons connected with him by virtue of these libations of water are called his *samanodakas*.[5]

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[1] See Colebrooke's "Digest," vol. ii. p. 572.

[2] *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (1888), 15 Calc. 780, at p. 791.

[3] R. K. Sarvadhikari's "Law of Inheritance," pp. 818, 819.

[4] *Ibid.*; above, note 2.

[5] Rajkumar Sarvadhikari's "Hindu Law of Inheritance," p. 57; "Mitakshara," chap. ii. s. v. para. 6.

He would also be a *samanodaka* of persons who offer libations to an individual to whom he offers a *pinda* or the *lepa*, and of persons who offer a *pinda* or the *lepa* to an individual to whom he offers libations.

"The doctrine of funeral cakes is the key to the whole Hindu law of inheritance."[1]

Mother, grandmother, great grandmother.

A man is also the *sapinda* of his mother,[2] his father's mother,[3] and his father's father's mother.[4]

Division of *sapindas*.

Sapindas are either agnate or *gotraja*[5] *sapindas*, *i.e.* connected entirely through males, or cognate or *bhinna-gotra*[6] *sapindas* otherwise *bandhus*, *i.e.* connected through females.

Under the Bengal school *sapinda* relation extends to the third degree. Under the Mitakshara school (*ante*, p. 379), it extends to the sixth degree, *sakulyas* not being recognized, as such, by the latter school.

Bandhus. Ex parte paternâ.

According to the "Daya-Bhaga" *bandhus* are either—

(1) Connected with the deceased through the father, father's father, or father's father's father of the mother of the *bandhu*.

These are all daughters' sons in the branch to which they belong. They rank after the male issue in their branch, and, according to Rajkumar Sarvadhikari, before the males of the branch above them.[7] Three are mentioned in the "Daya-Bhaga,"[8] viz. the sons of the daughter of the father,[9] of the grandfather,[10] of the great grandfather.[11]

Ex parte maternâ.

Or (2) connected with the deceased through the father, father's father, or father's father's father of the mother of the deceased.

The first kind are *sapindas* because they offer cakes to their maternal ancestors who are the paternal ancestors of the deceased.

The second kind are *sapindas* because they offer cakes to their paternal ancestors, who are the maternal ancestors of the deceased.

"Therefore a kinsman whether sprung from the family (of the deceased), though of different male descent, as his own daughter's son, or his father's daughter's son, or sprung from a different family, as his maternal uncle or the like, being allied by a common funeral cake (*pind*) on account of

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[1] *Amrita Kumari Debi* v. *Lakhi Narayan Chuckerbutty* (1868), 2 B. L. R. F. B. 28, at p. 39; S. C. *Omrit Koomaree Dabee* v. *Luckee Narain Chuckerbutty*, 10 W. R. F. B. 76, at p. 84; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 34; 13 W. R. F. B. 49, at p. 57.

[2] See *post*, pp. 426, 427.

[3] See *post*, p. 429.

[4] *Ibid.*

[5] Belonging to the same *gotra* or family.

[6] Belonging to a different *gotra* or family.

[7] *Post*, pp. 429, 430, 431.

[8] Chap. xi. s. vi. paras. 8, 9.

[9] *Post*, p. 429.

[10] *Ibid.*

[11] *Post*, p. 430.

their presenting offerings to three ancestors in the paternal and the maternal family of the deceased owner, is a *sapinda*." [1]

Order of succession.

The relative efficacy of the different kinds of offerings gives rise to the following rules for determining the order of succession :—

Sapindas before others.

I. All *sapindas*, whether agnate or cognate, succeed before any *sakulya*, and all *sakulyas* are preferred to any *samanodaka*.[2]

Thus a brother's daughter's son comes before the great great grandson of the owner's great grandfather.[3]

"The *sapindas* are allowed to come in before the *sakulyas*, because undivided oblations are considered to be of higher spiritual value than divided ones; and the *sakulyas* are in their turn preferred to the *samanodakas*, because divided oblations are considered to be more valuable than libations of water." [4]

The following rules are laid down primarily with regard to *sapindas*, but, bearing in mind Rule I., they are equally applicable to *sakulyas* and *samanodakas*.[5]

Descendants of deceased.

II. Those who offer the *pinda* to the deceased are preferred to those who offer it to any of his ancestors.

There is an exception in the case of the son's daughter's son, and the son's son's daughter's son.[6]

Descendants of paternal ancestors.

III. Those who offer funeral cakes to the paternal ancestors of the deceased are preferred to those who offer to his maternal ancestors only, irrespectively of the number of cakes offered.[7]

Thus the father's brother's daughter's son,[8] and the grandfather's brother's daughter's son,[9] are preferred to the mother's brother's son.

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[1] "Daya-Bhaga," chap. xi. s. vi. para. 19; *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1880), 6 Calc. 256, at pp. 263, 264; 7 C. L. R. 145, at p. 153.

[2] *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (1883), 9 Calc. 563; 12 C. L. R. 204; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 38; 13 W. R. F. B. R. 49, at p. 59; *Deyanath Roy* v. *Muthoor Nath Ghose* (1835), 6 Ben. Sel. R. 27 (new edition, 30); *Kedar Nath Ray* v. *Amrita Lal Mukerjee* (1912), 17 C. W. N. 492.

[3] *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (1883), 9 Calc. 563; 12 C. L. R. 204.

[4] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 38; 13 W. R. F. B. 49, at p. 59.

[5] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. R. 49, at p. 59.

[6] *Post*, p. 430.

[7] *Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1874), 15 B. L. R. 35; 23 W. R. C. R. 117; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. R. 49, at p. 59.

[8] *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285.

[9] *Kailash Chundra Adhikari* v. *Karana Nath Chowdhry* (1913), 18 C. W. N. 477.

"The *sapindas* in the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer, and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering oblations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer; and therefore, while both are entitled to inherit his estate, the latter succeed only on failure of the former." [1]

Descendants of father before those of grand-father, etc.

IV. A *sapinda* who offers oblations to the father of the deceased is to be preferred to a *sapinda* who offers oblations to the grandfather or great grandfather, although the latter offers more cakes of the same description, and similarly a *sapinda* who offers to the paternal grandfather is preferred to one who offers to the paternal great grandfather.[2]

Agnates before cognates in same line.

V. Agnate *sapindas* in any line are always preferred to the cognate *sapindas* of the same line.[3]

Agnates before cognates of equal degree.

VI. Between an agnate *sapinda* and a cognate *sapinda* of equal degree of propinquity, the former is preferred to the latter, although the latter is the giver of a larger number of cakes in which the deceased would participate than the former.[4]

Number of cakes offered.

VII. Subject to the above rules, those who offer the larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description which the deceased receives or in which he participates.[5]

Thus a brother comes before a brother's son.

This is generally equivalent to saying that the nearer *sapinda* excludes the more remote.[6]

Half blood.

As an example of this rule, those who offer oblations to both

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[1] *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285, at p. 291; *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. 49, at p. 59.

[2] "Daya-Bhaga," chap. xi. s. vi. paras. 5, 6; *Pran Nath Surma Jowardar* v. *Surrut Chunder Bhuttacharjee* (1882), 8 Calc. 460; 10 C. L. R. 484.

[3] *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (1888), 15 Calc. 780, at pp. 790, 791.

[4] *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (1888), 15 Calc. 780, at p. 790.

[5] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. R. 49, at p. 59.

[6] *Ante*, p. 417.

paternal and maternal ancestors, are superior to those who offer only to the paternal ancestors.[1]

A brother of the full blood is therefore preferred to a brother of the half blood.[2]

VIII. Where the number of such cakes is equal, those that are offered to nearer ancestors are preferred to those offered to more distant ones.[3] Offering to nearer ancestors.

According to these rules cognates are not, as in the "Mitakshara,"[4] postponed to all agnates, but are preferred to such agnates as are capable of less religious efficacy.

Following the above rules we find the order of succession among *sapindas*, according to the Bengal school, to be as follows :— Order of succession among *sapindas*.

Descendants of the Deceased[5] *and his Widow.*

1. Son.[6] Sons.

It is clear that the illegitimate sons of the twice-born have no rights of inheritance,[7] and, according to the decisions of the High Court of Bengal, an illegitimate son of a Sudra cannot inherit according to the Bengal school. Illegitimate sons.

This view has been arrived at by limiting the expression "*dasiputra*" in the "Daya-Bhaga"[8] to the son of a female slave,[9] and by holding that the abolition of slavery precludes the existence of a "*dasiputra*" at the present day. His father can give him a share of the property.[10]

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[1] *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147, at p. 152; *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27; 24 W. R. C. R. 234; 4 I. A. 153, note; Colebrooke's "Digest," vol. iii. p. 480.

[2] *Post*, p. 427; "Daya-Bhaga," chap. xi. s. v. para. 12.

[3] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. 49, at p. 59; *Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1874), 15 B. L. R. 35, at p. 47; 23 W. R. C. R. 117, at p. 120.

[4] *Ante*, pp. 397, 398.

[5] See *ante*, p. 421.

[6] "Daya-Bhaga," chap. iii. s. i. para. 18; chap. xi. s. i. para. 32.

[7] "Daya-Bhaga," chap. ix. para. 25. See *ante*, pp. 382–385.

[8] Chap. ix. paras. 29, 30.

[9] *Ram Saran Garain* v. *Tekchand Garain* (1900), 28 Calc. 194; *Kirpal Narain Tewari* v. *Sukurmoni* (1891), 19 Calc. 91; *Narain Dhara* v. *Rakhal Gain* (1875), 1 Calc. 1; 23 W. R. C. R. 334. If this question be reconsidered it may well be held that the texts contemplate the son, not only of a slave, but of any kept woman, see Jolly's "Hindu Law of Partition, etc.," pp. 187, 188; Sarkar's "Hindu Law," 2nd ed., pp. 189, 190; Ghose's "Hindu Law," 2nd ed., pp. 655–659. It is not very clear why the expression *dasi putra* should have a different meaning under the "Daya-Bhaga" from that which it has under the "Mitakshara," see *ante*, p. 383, note 1.

[10] "Daya-Bhaga," chap. ix. para. 29.

Grandson.

2. Son's son.[1]

As in the case of the Mitakshara (*ante*, p. 385), son's sons take the share of their deceased father by representation.

Great grandson.

3. Son's son's son.[2]

As in the case of the Mitakshara (*ante*, p. 386), son's son's sons take the share of their deceased father by representation.

Widow.

4. Widow.[3]

The widow succeeds whether the property be divided or undivided.[4]

Where there are several widows, they take jointly with rights of survivorship and of partition as in the case of those governed by the "Mitakshara." [5]

For a custom excluding sonless widows, see *Russic Lal Bhunj* v. *Purush Munnee*, Beng. S. D. A. 1847, p. 205.

The estate of the widow is devested by the birth [6] or adoption [7] of a son.

As to the interest taken by a widow, see *post*, chap. xv.

Daughter.

5. Daughter.[8]

"Daughters confer no benefit, but they succeed because their sons do." [9]

Priority amongst daughters.

"The unmarried daughter is first entitled to inherit: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue [10] are together entitled to the succession. Daughters who are barren, or

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[1] "Daya-Bhaga," chap. iii. s. i. para. 18; chap. xi. s. i. para. 34.

[2] "Daya-Bhaga," chap. iii. s. i. para. 18; chap. xi. s. i. para. 34; *Gooroogobindo Chowdhry* v. *Hureemadhub Roy* (1863), Marsh, 398; 2 Hay, 401.

[3] "Daya-Bhaga," chap. xi. s. i. paras. 6, 43; *Cossinaut Bysack* v. *Hurroosoondry Dossee* (1819), Morley's "Digest," vol. ii. p. 198; Norton's L. C. 85; S. C. on appeal (1826), Sircar's "Vyavastha Darpana," 2nd ed., p. 97; Clarke, 91; Montriou's cases, p. 495; *Mohun Lall Khan* v. *Siroomunnee (Ranee)* (1812), 2 Ben. Sel. R. 32 (new edition, 40); *Durga Nath Pramanik* v. *Chintamoni Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11; *Deepo Debia* v. *Gobindo Deb* (1871), 16 W. R. C. R. 42; *Chunder Kant Surmah* v. *Bungshee Deb Surmah* (1866), 6 W. R. C. R. 61.

[4] *Srinath Serma* v. *Radhakaunt* (1796), 1 Ben. Sel. R. 15 (2nd ed., 19); *Bhyroochund Rai* v. *Russoomunee* (1799), 1 Ben. Sel. R. 27 (2nd ed., 36); *Radha Churn Rai* v. *Kishenchund Rai* (1801), 1 Ben. Sel. R. 33 (2nd ed., 44); and other cases cited in 1 Morley, 316.

[5] *Ante*, p. 387.

[6] *Bamundoss Mookerjea* v. *Tarinee (Mussamut)* (1858), 7 M. I. A. 169, at p. 183; *ante*, p. 387.

[7] *Ante*, pp. 193, 194.

[8] "Daya-Bhaga," chap. xi. s. ii. para. 1.

[9] *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (1874), 22 W. R. C. R. 393.

[10] It does not seem to be necessary that the son should be capable of presenting oblations, as the text of the "Daya-Bhaga" (chap. xi. s. ii. para. 3), upon which the right of the married daughters is based, does not contain expressions, which in the case of succession to *stridhan* gave foundation to the arguments used in *Charu Chunder Pal* v. *Nobo Sunderi Dasi* (1891), 18 Calc. 327.

widows without male issue, or mothers of daughters only can under no circumstances inherit."[1]

Sastri G. C. Sarkar[2] considers that a daughter having a power of adoption must now be considered as capable of having a son and therefore as an heir, but it is submitted that there is no authority for this proposition.

A childless widow does not acquire by remarriage any right to inherit to her father,[3] but by remarrying before her father's death she becomes entitled to inherit her father's estate along with other married daughters.[4]

It has been suggested[5] that a widowed daughter, who is not past the age of childbearing, can inherit, as the law now permits her to remarry,[6] but it is submitted that modern legislation, although it may supersede the authority of ancient texts, cannot be used for construing them.

On the death of a daughter who has taken, the estate passes (in preference to her sons) to her sisters who have taken or are competent to take.[7]

Daughters, who inherit, take a joint estate with rights of survivorship and partition.[8] A surviving sister takes by survivorship, not as a reversioner.[9]

Where two daughters have succeeded jointly to their father's estate, and at the death of one of them the survivor is a childless widow, the latter will nevertheless take by survivorship the whole estate.[10]

As to the nature of the estate taken by a daughter, see *post*, chap. xv.

6. Daughter's son.[11]

Daughter's son.

A daughter's son is not entitled to succeed as heir to his maternal grandfather's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives.[12]

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1 *Mokunda Lal Chakrabarti* v. *Monmohini Debi* (1914), 19 C. W. N. 472; *Binode Koomaree Dabee* v. *Purdhan Gopal Sahee* (1865), 2 W. R. C. R. 176, at p. 177; *Taramonee Gooptea* v. *Luckheemonee Dossee* (1862), Marsh, 29; 1 Ind. Jur. O. S. 22; Hay, 67; *Radha Kishen Manjhee* v. *Ram Mundul* (*Rajah*) (1866), 6 W. R. C. R. 147; *Rajchunder Das* v. *Dhunmunee* (*Mussummaut*) (1824), 3 Ben. Sel. R. 362 (new edition, 482); "Daya-Bhaga," chap. xi. s. ii. para. 3. As to an unmarried prostitute daughter, see *ante*, p. 388.

2 "Law of Adoption," pp. 397, 398.

3 Act XV. of 1856, s. 4.

4 See *Ibid.*, s. 5.

5 *Bimola* (*Sreemutty*) v. *Dangoo Kansaree* (1873), 19 W. R. C. R. 189.

6 *Ante*, p. 37.

7 *Tinumoni Dasi* v. *Nibarun Chunder Gupta* (1882), 9 Calc. 154; 12 C. L. R. 376, overruling *Radha Kishen Manjhee* v. *Ram Mundul* (*Rajah*) (1866), 6 W. R. C. R. 147, see *ante*, p. 389.

8 *Aumirtolall Bose* v. *Rajoneekant Mitter* (1875), 2 I. A. 113, at pp. 126, 127; 15 B. L. R. 10, at p. 24; 23 W. R. C. R. 214, at p. 218; *Boidya Nath Sett* v. *Durga Charan Basak* (1865), S. C. Sircar's "Vyavastha Darpana," 2nd ed., pp. 170, 171.

9 *Ibid.*; *Sachindra Kishore Dey* v. *Rajani Kant Chuckerbutty* (1914), 18 C. W. N. 904.

10 *Aumirtolall Bose* v. *Rajoneekant Mitter* (1875), 2 I. A. 113; 15 B. L. R. 10; 23 W. R. C. R. 214.

11 "Daya-Bhaga," chap. xi. s. ii. paras. 2, 17–29.

12 *Aumirtolall Bose* v. *Rajoneekant Mitter* (1875), 2 I. A. 113; 15 B. L. R. 10; 23 W. R. C. R. 214. See *Sib Chunder Mullick* v. *Trepoorah Soondary Dossee* (1842), Fulton, 98.

Daughter's son's son. Son's daughter's son and grandson's daughter's son.

A daughter's son's son is not an heir according to the Bengal school. Pundit Rajkumar Sarvadhikari[1] at this point introduces the son's daughter's son,[2] and the son's son's daughter's son,[3] on the ground that they also present *pindas* directly to the deceased,[4] and this is said by Mr. J. C. Ghose[5] to be the law as laid down by the *Rishis* (sages of antiquity). Opinions of judges[6] have, however, placed these persons in the succession following the paternal great grandfather's daughter's son.[7] Sastri G. C. Sarkar[8] would apparently place them after the mother's sister's son.[9] If the principle that an offering to the deceased himself is to be preferred to an offering in which he participates[10] be carried out to its entirety, these descendants would be entitled to the position assigned to them by Pundit Rajkumar Sarvadhikari. The fact that they are not mentioned in the "Daya-Bhaga" is not by itself conclusive,[11] but in this case goes a long way to show that they were not intended to come in at this point.

Father and his descendants.

The descendants of the deceased being exhausted, the inheritance passes to the father of the deceased, and after him in order of proximity (after the mother) to such of the agnate descendants of the father as are *sapindas* of the deceased, and then also in order of proximity to such of the cognate descendants of the father as are *sapindas* of the deceased.

Father.

7. The father.[12]

The father is preferred to the mother because he presents oblations to the father's father and father's father's father of the deceased.

Mother.

8. The mother.[13]

The "Daya-Bhaga"[14] gives the mother this right in the following words: "Her claim properly precedes that of the brothers and the rest; since it is necessary to make a grateful return to her, for benefits which

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1 "Hindu Law of Inheritance," p. 821. See also J. N. Bhattacharya's "Hindu Law," 2nd ed., 503.

2 See *post*, p. 430.

3 *Ibid.*

4 See *ante*, p. 421.

5 "Hindu Law," 2nd ed., pp. 103, 105.

6 *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (1888), 15 Calc. 780, at pp. 793, 794; *Prannath Surma Jowardar* v. *Surrut Chundra Bhuttacharjee* (1882), 8 Calc. 460, at pp. 463, 464; 10 C. L. R. 484, at p. 487, citing Colebrooke's "Digest," iii. 530. See *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285, at p. 291.

7 *Post*, p. 430. See *Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1874), 15 B. L. R. 35; 23 W. R. C. R. 117.

8 "Hindu Law," 3rd ed., p. 286.

9 *Post*, p. 431.

10 *Ante*, p. 419.

11 Cf. *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 42; 13 W. R. F. B. 49, at p. 61; *Prannath Surma Jowardar* v. *Surrut Chundra Bhuttacharjee* (1882), 8 Calc. 460, at p. 463; 10 C. L. R. 484, at p. 486.

12 "Daya-Bhaga," chap. xi. s. iii.; *Hemlutta Debea* v. *Goluck Chunder Gosayn* (1842), 7 Ben. Sel. R. 108 (new edition, 127).

13 "Manu," chap. ix. paras. 131–140.

14 Chap. xi. s. iv. para. 2. See also "Daya-Krama Sangraha," chap. i. s. vi. para. 2.

she has conferred by bearing the child in her womb and nurturing him during his infancy; and also because she confers benefits on him by the birth of other sons who may offer funeral oblations in which he will participate. A mother tastes with her husband the funeral repast consisting of oblations to the manes; and the paternal grandmother with her husband; and the paternal great grandmother with hers." [1]

A stepmother has no rights of inheritance, as she confers no spiritual benefit on her stepson.[2] Stepmother.

Father's Agnate Descendants.

9. Brothers.[3] Brothers.

An undivided brother is preferred to a divided brother.[4]

Brothers of the whole blood are preferred to brothers of the half blood,[5] whether the property be divided or undivided.[6] Half brothers.

The former make offerings both to the paternal and maternal ancestors of the deceased, and the latter offer to his paternal ancestors only.[7]

When a half brother is joint with the deceased, and the whole brother has separated, they take together.[8]

A sister is not an heir according to the Bengal school.[9] The fact that a sister might produce an heir does not make her an heir,[10] but if her son be conceived at the time of the succession opening out he will succeed.[11] Sister.

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[1] "Daya-Bhaga," chap. xi. s. vi. para. 3; Colebrooke's "Digest," vol. iii. pp. 519, 598, 625. See "Manu," chap. ix. para. 45.

[2] "Daya-Bhaga," chap. xi. s. vi. para. 3; *Bhyrobee Dossee* v. *Nubkissen Bhose* (1836), 6 Ben. Sel. R. 53 (new edition, 61); *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1833), 5 Ben. Sel. R. 315 (new edition, 369); *Alhadmoni Dassea* v. *Gokoolmoni Dassea*, Ben. S. D. A. of 1852, p. 563.

[3] "Daya-Bhaga," chap. xi. s. v. paras. 1–3.

[4] *Kesabram Mahapattar* v. *Nandkishor Mahapattar* (1869), 3 B. L. R. A. C. 7; 11 W. R. C. R. 308; *Jaudubchunder Ghose* v. *Benodbeharry Ghose* (1864), 1 Hyde, 214.

[5] "Daya-Bhaga," chap. xi. s. v. paras. 9–12; *Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* (1869), 12 M. I. A. 523; at pp. 539, 541; 3 B. L. R. P. C. 13, at pp. 17, 18; 12 W. R. P. C. 21, at pp. 23, 24.

[6] *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147; approving of *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27; 24 W. R. C. R. 234; *Ishen Chunder Chowdhry* v. *Bhyrub Chunder Chowdhry* (1866), 5 W. R. C. R. 21.

[7] *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147, at p. 152; *ante*, pp. 422, 423.

[8] *Sheo Soondary* v. *Pirthee Singh* (1877), 4 I. A. 147, at p. 153; *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (1875), 1 Calc. 27; 24 W. R. C. R. 234; 4 I. A. 153; Ghose's "Hindu Law," 2nd ed., p. 139.

[9] *Kirpa Mayee Dibeeah* (*Raj Koonwaree*) v. *Damoodur Chunder Deyb* (1845), 7 Ben. Sel. R. 192 (2nd ed., 226); *Kalee Pershad Sarma* v. *Bhoirabee Dabee* (1865), 2 W. R. C. R. 180; *Ramdyal Deb* v. *Magnee* (*Musst*) (1864), 1 W. R. C. R. 227; *Rukkini Dasi* (*Srimati*) v. *Kadarnath Ghose* (1870), 5 B. L. R. App. 87; *Anund Chunder Mookerjee* v. *Teetooram Chatterjee* (1866). 5 W. R. C. R. 215; Colebrooke's "Digest," vol. iii. p. 517.

[10] *Kesub Chunder Ghose* v. *Bishno Persaud Ghose*, Ben. S. D. A. 1860, ii. 340; 2 Sev. A. C 240; *contrâ Karuna Mai* v. *Jai Chandra Ghose* (1830), 5 Ben. Sel. R. 46 (new edition, 50).

[11] *Ante*, pp. 362, 363.

Brother's son.

10. Brother's son.

A brother's son who was joint with the deceased is preferred to one that was separate.[1]

Half blood.

Sons of brothers of the whole blood succeed before sons of brothers of the half blood.[2]

A united brother's son of the whole blood succeeds before a divided brother's son of the whole blood, and a united brother's son of the half blood succeeds before a divided brother's son of the half blood, but if the son of the whole brother be separated, and the son of the half brother be united, then they both inherit together.[3]

The son of a reunited brother succeeds to the exclusion of all the sons of unassociated brothers.[4]

Brother's grandson.

11. Brother's son's son.[5]

The same principle as to the preference of those who are united,[6] and of those who are of full blood,[7] as in the case of brothers and brothers' sons, would apparently apply.

A brother's son's daughter is not an heir.[8]

A brother's son's son's son is a *sakulya*, and therefore comes after a brother's daughter's son.[9]

Father's Cognate Descendants.

Sister's son.

12. Sister's son.[10]

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[1] *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (1908), 35 Calc. 721, at p. 724; 12 C. W. N. 511, at p. 513; *Jaudub Chunder Ghose* v. *Benodbeharry Ghose* (1864), 1 Hyde, 214.

[2] *Kylash Chunder Sircar* v. *Gooroo Churn Sircar* (1865), 3 W. R. C. R. 43; S. C. affirmed on review, *Gooroo Churn Sircar* v. *Koylash Chunder Sircar* (1866), 6 W. R. C. R. 93; "Daya-Bhaga," chap. xi. s. vi. para. 2.

[3] "Daya-Krama Sangraha," chap. i. s. viii. paras. 3–5.

[4] W. Macnaghten's "Hindu Law," vol. ii. p. 72; Colebrooke's "Digest," vol. iii. p. 524.

[5] "Daya-Bhaga," chap. xi. s. vi. para. 6.

[6] *Ante*, p. 427.

[7] *Ibid.*

[8] *Radha Pearee Dossee* v. *Doorga Monee Dossia* (1866), 5 W.R.C.R. 131.

[9] *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (1883), 9 Calc. 563; 12 C. L. R. 204, differing from *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (1875), 24 W. R. C. R. 229.

[10] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15; 13 W. R. F. B. 49; *Gunesh Chunder Roy* v. *Nilkomul Roy* (1874), 22 W. R. C. R. 264; *Seeta Ram Gossain* v. *Fukeer Chand Chuckerbutty* (1871), 15 W. R. C. R. 433; *Raj Chunder Narain Chowdhry* v. *Goculchund Goh* (1801), 1 Ben. Sel. R. 43 (new edition, 56); *Lakhi Priya* v. *Bhairab Chandra Chaudhuri* (1833), 5 Ben. Sel. R. 315 (new edition, 369); *Sumbochunder Roy* v. *Gunga Churn Sein* (1838), 6 Ben. Sel. R. 234 (new edition, 291); *Karuna Mai* v. *Jai Chandra Ghose* (1830), 5 Ben. Sel. R. 46 (new edition, 50); "Daya-Bhaga," chap. xi. s. vi. para. 8.

Great Grandfather's Agnate Descendants.

Paternal granduncle. Paternal granduncle's son. Paternal granduncle's grandson.

21. Father's father's father's son.
22. His son.[1]
23. His son's son.[2]

Great Grandfather's Cognate Descendants.

Paternal grandaunt's son.

24. Paternal great grandfather's daughter's son.[3]

Pundit Rajkumar Sarvadhikari[4] places at this point the great grandfather's son's daughter's son[5] and the great grandfather's grandson's daughter's son.[6]

Following these[7] come some heirs who would, according to Pundit R. K. Sarvadhikari, be placed earlier.[8] Sastri G. C. Sarkar[9] would place them after some of the maternal relations who take after them, and says that they are only to be placed here provisionally.[10] They are described by Mr. J. C. Ghose[11] as daughter's sons and are as follows :—

Son's daughter's son. Grandson's daughter's son. Brother's daughter's son. Nephew's daughter's son.

25. Son's daughter's son.[12]
26. Son's son's daughter's son.[12]
27. Brother's daughter's son.[13]
28. Brother's son's daughter's son.[14]

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[1] *Gopal Chunder Nath Coondoo* v. *Haridas Chini* (1885), 11 Calc. 343.

[2] *Mahoda* v. *Kulcani* (1803), 1 Ben. Sel. R. 67 (new edition, 82).

[3] G. C. Sarkar's "Hindu Law," 3rd ed., p. 286; *Gosaien Chund Kobraj* v. *Kishenmunnee* (*Mussummaut*) (1836), 6 Ben. Sel. R. 77 (new edition, 90); "Daya-Bhaga," chap. xi. s. vi. para. 9.

[4] "Hindu Law of Inheritance," p. 823. See *ante*, pp. 423 (rule viii.), 428, 429.

[5] *Post*, p. 431.

[6] *Ibid.*

[7] G. C. Sarkar's "Hindu Law," 3rd ed., pp. 307, 308.

[8] *Ante*, p. 426.

[9] "Hindu Law," 3rd ed., p. 286. See pp. 307, 308.

[10] This apparently means that on further consideration a different place will be assigned to them. According to Pundit Rajkumar Sarvadhikari ("Hindu Law of Inheritance," pp. 821, 822) they will be placed respectively in the lines of the deceased, his father, his grandfather, and his great grandfather, following the persons in such lines who are heirs.

[11] "Hindu Law," 2nd ed., p. 139.

[12] Colebrooke's "Digest," vol. iii. p. 530.

[13] *Ibid.*; *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (1883), 9 Calc. 563; 12 C. L. R. 204; *Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1874), 15 B. L. R. 35; 23 W. R. C. R. 17; *Huri Das Bundopadhya* v. *Bama Churn Chattopadhya* (1888), 15 Calc. 780. See *ante*, p. 429.

[14] *Prannath Surma Jowardar* v. *Surrut Chunder Bhuttacharjee* (1882), 8 Calc. 460; 10 C. L. R. 484; Colebrooke's "Digest," vol. iii. p. 530.

29. Paternal uncle's daughter's son.[1]
30. Paternal uncle's son's daughter's son.
31. Paternal granduncle's daughter's son.
32. Paternal granduncle's son's daughter's son.[2]

Paternal uncle's daughter's son. Paternal uncle's son's daughter's son. Paternal granduncle's daughter's son. Granduncle's son's daughter's son.

Then follow the *sapinda* relations of the deceased through his maternal grandfather.[3]

Sapindas ex parte maternâ.

They are—

33. The maternal grandfather.[4]

Maternal grandfather.

The Agnate Descendants of the Maternal Grandfather.

34. Mother's brother.[5]
35. Mother's brother's son.[6]
36. Mother's brother's son's son.[7]

Maternal uncle. His son. His grandson.

The Cognate Descendants of the Maternal Grandfather.

37. Mother's sister's son.[8]

Mother's sister's son.

Pundit Rajkumar Sarvadhikari would put in at this point the maternal grandfather's son's daughter's son, and the maternal grandfather's grandson's daughter's son, but, as in the cases above,[9] they and the persons similarly situated in the lines of the maternal great grandfather and of the maternal great great grandfather would be postponed until after the maternal great great grandfather's daughter's son.[10]

Then follow the *sapinda* relations of the deceased through his maternal great grandfather.

Maternal great grandfather's line.

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[1] *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose Mazumdar* (1870). 5 B. L. R. 15; 13 W. R. F. B. 49; *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285; *Gopal Chunder Nath Coondoo* v. *Haridas Chini* (1885), 11 Calc. 343. See *Gobindo Hureekar* v. *Woomesh Chunder Roy* (1864), W. R. F. B. R. 176; *Kedar Nath Roy* v. *Amrita Lal Mukerjee* (1912), 17 C. W. N. 492.

[2] It was held in *Kailash Chundra Adhikari* v. *Karuna Nath Chowdhry* (1913), 18 C. W. N. 477, followed in *Kedar Nath Banerjee* v. *Haridas Ghosh* (1915), 43 Calc. 1; 19 C. W. N. 1181, that he comes before a maternal uncle.

[3] "Daya-Bhaga," chap. xi. s. vi. para. 20; "Daya-Krama Sangraha," chap. i. s. x. paras. 14–21.

[4] "Daya-Krama Sangraha," chap. i. s. x. para. 14.

[5] "Daya-Krama Sangraha," chap. i. s. x. para. 15; *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 229; 8 Calc. 302.

[6] *Roopchurn Mohapater* v. *Anund Lal Khan* (1812), 2 Ben. Sel. R. 35 (new edition, 45); *Srimuty Dibeah* (*Rany*) v. *Koond Luta* (*Rany*) (1847), 4 M. I. A. 292; 7 W. R. P. C. 44; *Kassee Issoree Dibbeah* (*Musst*) v. *Goluck Chunder Gungolee*, Ben. S. D. A. 1848, p. 28; *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285. See above, note 2.

[7] "Daya-Krama Sangraha," chap. i. s. x. para. 16.

[8] *Deyanath Roy* v. *Muthoor Nath Ghose* (1835), 6 Ben. Sel. R. 27 (new edition, 30).

[9] *Ante*, pp. 429, 430.

[10] *Post*, pp. 432, 433. According to Sastri G. C. Sarkar's views ("Hindu Law," 3rd ed., p. 286), they should not have preference of all *sakulyas*.

38. The maternal great grandfather.

The Agnate Descendants of the Maternal Great Grandfather.

39. His son.[1]
40. His son's son.[2]
41. His son's son's son.[3]

The Cognate Descendants of the Maternal Great Grandfather.

42. His daughter's son.

Pundit Rajkumar Sarvadhikari [4] places here the maternal great grandfather's son's daughter's son, and grandson's daughter's son.[5]

Maternal great great grandfather's line.

Then follow the *sapinda* relations of the deceased through his maternal great great grandfather.

43. The maternal great great grandfather.

The Agnate Descendants of the Maternal Great Great Grandfather.

44. His son.[6]
45. His son's son.[6]
46. His son's son's son.[6]

The Cognate Descendants of the Maternal Great Great Grandfather.

47. The maternal great great grandfather's daughter's son.[7]

Pundit Rajkumar Sarvadhikari [8] places here the maternal great great grandfather's son's daughter's son, and grandson's daughter's son.[9]

Then apparently come the persons who, although *sapindas*, are not included in the foregoing enumeration, viz.—

Other *sapindas ex parte maternâ.*

48. The maternal grandfather's son's daughter's son.

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[1] "Daya-Krama Sangraha," chap. i. s. x. para. 17.

[2] See *Pudma Coomari Debi* v. *Court of Wards* (1881), 8 I. A. 89; 8 Calc. 302.

[3] "Daya-Krama Sangraha," chap. i. s. x. para. 17; *Braja Kishor Mitter Mazumdar* v. *Radha Gobind Dutt* (1869), 3 B. L. R. A. C. 435; 12 W. R. C. R. 339.

[4] "Law of Inheritance," p. 823.

[5] See *ante*, pp. 429, 430, 431, and below.

[6] "Daya-Krama Sangraha," chap. i. s. x. para. 19.

[7] *Ibid.*, para. 20.

[8] "Law of Inheritance," p. 823.

[9] *Ante*, pp. 429, 430, 431, and *post*, p. 433.

49. The maternal grandfather's grandson's daughter's son.

50. The maternal great grandfather's son's daughter's son.

51. The maternal great grandfather's grandson's daughter's son.

52. The maternal great great grandfather's son's daughter's son.

53. The maternal great great grandfather's grandson's daughter's son.

Succession of *sakulyas*, and *samanodakas*.

Failing all *sapindas*, whether *gotraja*, or *bhinna gotra*, the *sakulyas* [1] succeed.

Failing all *sakulyas*, the *samanodakas* succeed.[2]

In determining rival claims of *sakulyas* or of *samanodakas* the rules for determining the succession of *sapindas* [3] are to be applied.[4]

As to inheritance to the property of hermits and members of religious orders, see *ante*, pp. 415, 416. As to escheat, see *ante*, p. 416.

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[1] *Ante*, p. 419.

[2] *Ante*, pp. 419, 420.

[3] *Ante*, pp. 421–423.

[4] *Guru Gobind Shaha Manda* v. *Anand Lal Ghose Mazumdar* (1870), 5 B. L. R. 15, at p. 39; 13 W. R. F. B. R. 49, at p. 59.

CHAPTER XIII.

STRIDHAN PROPERTY.

Meaning of "*Stridhana*." "Daya-Bhaga."

PROPERTY held by women is called "*Stridhana*."[1] This expression is, under the "Daya-Bhaga,"[2] confined to property which "she has power to give, sell or use, independently of her husband's control." This is sometimes described as "technical *stridhan*." In the "Mitakshara"[3] the expression is not used in any technical sense. It includes all kinds of property held by a woman.

"Mitakshara."

Property received by a woman by inheritance, and in which she has only a restricted interest, is dealt with in Chap. XV., *post*. This chapter deals only with other property belonging to a female.

Except that the rules for inheritance of *sulka* differ from those in the case of other kinds of *stridhana*, the "Mitakshara" does not distinguish between different kinds of *stridhana*.

No distinction is made in the "Mitakshara" between property inherited by a woman from a male and from a female.[4] According to the "Mitakshara," whatever is lawfully acquired in any manner by a woman, married or not, is her *stridhana*.[5]

"Mayukha."

The author of the "Mayukha," "like the author of the 'Mitakshara,' declines to look upon the enumeration of specific kinds of *stridhan* in the old Smriti texts as exhaustive. He includes under the name all that under the law becomes the property of the woman, only, unlike the author

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1 "*Stri*," woman; "*Dhana*," property.

2 Chap. i. s. i. para. 18.

3 Chap. ii. s. xi. paras. 3, 4. See *Sheo Shankar Lal* v. *Debi Sahai* (1903), 30 I. A. 202, at p. 205; 25 All. 468, at p. 472; 7 C. W. N. 831, at p. 837; 5 Bom. L. R. 828; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 272; *Gandhi Maganlal* v. *Jadab* (*Bai*) (1899), 24 Bom. 192, at p. 217; *Virasangappa Shetti* v. *Rudrappa Shetti* (1895), 19 Mad. 110, at p. 118. The Southern Indian authorities seem to limit the expression "*stridhana*" to the cases where the wife has complete control over property, see "Daya-Vibhaga" (Burnell's translation), pp. 40–42; "Smriti Chandrika," chap. ix. s. i.

4 *Gandhi Maganlal* v. *Jadab* (*Bai*) (1899), 24 Bom. 192, at p. 217; 1 Bom. L. R. 574.

5 Chap. ii. s. xi.; *Salemma* v. *Lutchmana Reddi* (1897), 21 Mad. 100, at p. 103; *post*, p. 440. See Banerjee's "Hindu Law of Marriage," 3rd ed., pp. 291–296.

of the 'Mitakshara,' he distinguishes the specific kinds enumerated in the texts from those which are not so enumerated, for purposes of inheritance." [1]

Ancient writers described *stridhan* property with regard to the then usual modes of acquisition of property by a bride or wife, as such; but such descriptions are not exhaustive.[2]

Stridhan according to ancient writers.

Sources of property which with the change of ideas and habits became possible to a woman, such as property acquired by her by her own exertions, or by investment and speculation, would now be treated as *stridhana.*[3]

Proof.

There is no special rule as to the burden of proof in a case where there is a question whether certain property is *stridhan* property or not. The ordinary rules of burden of proof in the case of claims to property will apply,[4] and if a woman is out of possession and claims property as her *stridhan* she may have to prove her right. It has been held that where she claims property as her *stridhan* as against creditors of her husband, the burden is upon her.[5]

Classification of *stridhan.*

Stridhan property is classed according to the time when the woman acquired it.

If given at the time of the nuptials, it is styled "*Yautaka.*" [6]

If acquired by her at any other time, it is styled "*Ayautaka.*" [7]

Property promised at the time of the marriage, but not given until after the marriage, is "*Ayautaka.*" [8]

Descriptions of *stridhan.*

Property acquired by a woman in the following ways were described as *stridhan* in the *shastras* and Codes [9]:—

I. Gifts at the time of marriage (*yautaka*). These include—

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[1] *Manilal Rewadat* v. *Rewa* (*Bai*) (1892), 17 Bom. 758, at p. 769; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 260; *post*, pp. 452, 453.

[2] See "Mitakshara," chap. ii. s. xi. para. 4.

[3] *Post*, p. 440.

[4] See *Ran Bijai Bahadur Singh* (*Diwan*) v. *Indarpal Singh* (1899), 26 I. A. 226; 26 Calc. 871; 4 C. W. N. 1; 2 Bom. L. R. 1; *Narayana* v. *Krishna* (1884), 8 Mad. 214; *Chowdrani* v. *Tariny Kanth Lahiry* (1882), 8 Calc. 545; 11 C. L. R. 41.

[5] *Brojomohun Mytee* v. *Radha Koomaree* (*Mussamat*) (1864), W. R. C. R. 60; *Lamb* v. *Govind Money* (*Musst.*) (1852), Ben. S. D. A. p. 125.

[6] From "*Yuta*" (joined together), "Daya-Bhaga," chap. i. s. ii. paras. 13, 14; "Vyavahara Mayukha," chap. iv. s. x. para. 17; "Smriti Chandrika," chap. ix. s. iii. para. 13.

[7] "Daya-Krama Sangraha," chap. ii. s. iv. para. 1.

[8] *Mahendra Nath Maity* v. *Giris Chandra Maity* (1915), 19 Calc. 1287.

[9] Sarkar's "Hindu Law," 3rd ed., pp. 364–366; Banerjee's "Law of Marriage," 3rd ed., pp. 279 *et seq.*

Gifts at marriage.

(*a*) (*Adhyagnika stridhana*) Gifts before the nuptial fire,[1] *i.e.* at the actual marriage ceremony.

(*b*) (*Adhyavahanika stridhana*). Gifts received at the time of the marriage procession[2] or at any time of the marriage ceremonial (which lasts for several days) before or after the effective ceremony.[3]

The question whether a particular ceremony is a part of the marriage ceremony may be a question of the custom of a caste or district.[4]

Except under the "Daya-Bhaga"[5] these include gifts given at the time by strangers.[6]

II. *Sulka* (gratuity).

According to the more usual view, this was the gratuity for the receipt of which a girl is given in marriage.[7] It was originally paid to the father as the price of the bride, but when that was forbidden the father received it for the bride, and it became her property,[8] as her dowry.

According to the "Viramitrodaya,"[9] *sulka* is what is received by the bride or a married woman as a price of household furniture, conveyance, milch cattle, and ornaments. That work goes on to say:[10] "It has been explained in the 'Madanaratna,' that the price of household furniture, etc., which is taken from the bridegroom or the like for giving (in marriage) the bride, in the shape of the bride's ornaments, is the fee or *sulka*. In the 'Mitakshara,' however, it is said that the fee or *sulka* is that which, having been taken, the bride is given in marriage. But in both (the books) it is intended that the father or the like takes on the understanding that it is to belong to the bride; because otherwise, in the absence of her right thereto the application of the denomination of woman's property to it would be unreasonable."

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1 "Manu," chap. ix. para. 194; "Narada Smriti" (Jolly's translation), p. 95; "Vishnu" ("Viramitrodaya," G. C. Sarkar's translation, p. 220); "Mitakshara," chap. ii. s xi. para. 2; *Churamun Sahu* v. *Gopi Sahu* (1909), 13 C. W. N. 994, at p. 996.

2 "Manu," chap. ix. para. 194; "Narada Smriti" (Jolly's translation), p. 95. According to some authorities this class of gifts includes gifts at the time of the first visit to the husband's house for the purpose of staying there (*dviragamana*), G. C. Sarkar's "Hindu Law," 3rd ed., p. 364.

3 See *Bistoo Pershad Burral* v. *Radha Soonder Nath* (1871), 16 W. R. C. R. 115. In the "Dayatattwa" (G. C. Sarkar's translation, p. 54) we find, "The time of marriage means time previous and posterior to the actual time of marriage. This is described in the treatise on marriage to begin from the *sraddha* for prosperity and to end with the ceremony of prostrating before the husband."

4 *Bistoo Pershad Burral* v. *Radha Soonder Nath* (1871), 16 W. R. C. R. 304.

5 Chap. iv. s. i. para. 6.

6 See W. Macnaghten's "Hindu Law," chap. ii. pp. 121, 122; Colebrooke's "Digest," chap. iii. pp. 559, 560.

7 "Mitakshara," chap. ii. s. xi. para. 6.

8 See Ghose's "Hindu Law," 2nd ed., p. 314.

9 G. C. Sarkar's translation, pp. 222, 223.

10 *Ibid.*, p. 223.

A different meaning of *sulka* is given in the following paragraphs of the "Daya-Bhaga"[1]:—

Para. 20. "What is given to a woman by artists constructing a house or executing other work, as a bribe to send her husband or other person of her family to labour on such particular work is her fee. It is the fruit of labour since its purpose is to engage a labourer."[2] Para. 21, "Or a fee is that which is described by Vyasa,[3] 'what is given to bring the bride to her husband's house is denominated her fee.' That is what is given by way of bribe or the like to induce her to go to the house of her husband."

Bridegroom's price.

Sastri G. C. Sarkar[4] says: "The bridegroom's price also, which, according to recent practice originating in the moral and religious degradation of the so-called educated man, is extorted by the bridegroom's party from the bride's father, must on similar and stronger grounds of equity be considered to be the bride's *stridhana*, and the recipient must be held to be trustee for her." It is submitted that there are no grounds in law for this proposition, and it does not appear that in practice this money is treated as belonging to the bride.

Compensation for second marriage.

III. *Adhivedanika*, or the compensation given by a husband to his wife, on his taking a second wife.[5]

Gifts after marriage.

IV. Gifts made to a wife after marriage by her relations or by her husband's relations (*anwadeyika*).[6]

This obviously does not include family jewels lent to her for use.[7]

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[1] Chap. iv. s. iii. paras. 20, 21.

[2] See Colebrooke's "Digest," iii. p. 568. This paragraph arises from Jimutavahana having adopted a reading of the text of Katyayana defining a fee or *sulka* in which there is the word "*karminam*" (workmen) instead of "*karmanam*" (acts), "Viramitrodaya" (G. C. Sarkar's translation), p. 223.

[3] Colebrooke's "Digest," iii. p. 570. Whether this be called *sulka* or not it belongs to the woman, see Strange's "Hindu Law," vol. i. p. 29.

[4] "Hindu Law," 3rd ed., p. 365.

[5] "Vishnu" ("Viramitrodaya," G. C. Sarkar's translation, p. 220); "Mitakshara," chap. ii. s. xi. para. 2. See *ante*, p. 36.

[6] *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (1905), 32 I. A. 181; 33 Calc. 25; 10 C. W. N. 1; 7 Bom. L. R. 904 (bequest by a brother); *Ram Gopal Bhuttacharjee* v. *Narain Chunder Bandopadhya* (1905), 33 Calc. 315; 10 C. W. N. 510 (a grant of a lease reserving annual rent); it includes gifts from parents or husband, *Sitabai* v. *Wasantrao* (1901), 3 Bom. L. R. 201. "Manu," chap. ix. para. 194, and "Narada Smriti" (Jolly's translation), p. 95, refer to gifts by a mother, brother, and father. "Manu," chap. ix. s. 195, refers to gifts by the husband's family. "Vishnu" ("Viramitrodaya," G. C. Sarkar's translation, p. 220) speaks of "what is given by the father and mother, the son or the brother," and also of what is given by the "*bandhus*." "Mitakshara," chap. ii. s. xi. paras. 5–7. Additional presents given by a father after marriage come under this head, although he gave others at the marriage, *Gopal Chandra Pal* v. *Ram Chandra Pramanik* (1901), 28 Calc. 311.

[7] "Vyavahara Mayukha," chap. iv. s. x. para. 6; "Smriti Chandrika," chap. ix. s. i. para. 11.

Property in lieu of maintenance.

V. Property given for the purpose, or in lieu, of maintenance,[1] but not property allotted on partition to a wife or widow.[2]

Arrears of maintenance due to a Hindu widow at the time of her death,[3] and property purchased with money given to her for maintenance,[4] are her *stridhana*.

Property when maiden.

VI. Property belonging to a woman before marriage, whether obtained by gift [5] or otherwise.

Gifts by husband.

VII. Gifts or bequests by the husband (*pritidatta*),[6] whether of movable or immovable property.[7]

As to gifts or bequests of immovable property by a husband to his wife, see *post*, pp. 441–443.

Ornaments bought by the husband for investment,[8] or for use only on special occasions,[9] would not be the *stridhan* property of the wife.

The following modes of acquiring property were also referred to :—

Gifts by strangers.

Presents by strangers given after the time of the marriage and during coverture.

The "Viramitrodaya," [10] "Daya-Bhaga," [11] and "Smriti Chandrika," [12] while classing these as *stridhan*, assert the husband's dominion over them. They are really treated as presents to the husband.[13]

"It may . . . be deduced from the texts that, as a rule, it is only gifts obtained by a woman from her relations, and her ornaments and

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1 *Doorga Koonwar* (*Mussamut*) v. *Tejoo Koonwar* (*Mussamut*) (1866), 5 W. R. M. A. 53; *Nellaikumaru Chetti* v. *Marakathammal* (1876), 1 Mad. 166; *Subramanian Chetti* v. *Arunachelam Chetti* (1904), 28 Mad. 1.

2 *Ante*, p. 336.

3 *Court of Wards* v. *Mohessur Roy* (*Rajah*) (1871), 16 W. R. C. R. 76; "Daya-Bhaga," chap. iv. s. i. para. 15.

4 *Subramanian Chetti* v. *Arunachelam Chetti* (1904), 28 Mad. 1.

5 See *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1873), 11 B. L. R. 286; 19 W. R. C. R. 264; "Manu," chap. ix. para. 200.

6 Lit. gifts in token of love. This expression includes gifts by relations.

7 See "Manu," chap. ix. s. 195; "Narada Smriti" (Jolly's translation), p. 95; *Venkata Rama Rao* v. *Venkata Suriya Rao* (1880), 2 Mad. 333; 8 C. L. R. 309; S. C. in court below (1877), 1 Mad. 281; *Radha* (*Musst*) v. *Bisheshur Dass* (1874), 6 N. W. P. 279.

8 See G. C. Sarkar's "Hindu Law," 3rd ed., p. 365.

9 *Radha* (*Musst*) v. *Bisheshur Dass* (1874), 6 N. W. P. 279.

10 G. C. Sarkar's translation, p. 221.

11 Chap. iv. s. i. para. 20; *Ramdulol Sircar* v. *Joymoney Dabey* (*Sreemutty*) (1816), 2 Morley's "Digest," 65.

12 Chap. ix. s. i. para. 16.

13 See G. C. Sarkar's "Hindu Law," 3rd ed., p. 365.

apparel, that constitute her *stridhana;* and that the only gifts from strangers which come under that denomination are presents before the nuptial fire, and (according to some) presents made at the bridal procession. But neither gifts obtained from strangers at any other time, nor her acquisition by labour and skill, would constitute her *stridhana.*" [1]

Property acquired by a sunnud from Government, in which a widow gets a full proprietary and transferable right, is descendible to her heirs,[2] and it has been held that a service inam which had been enfranchised in a married woman's favour was her *stridhana* property and descendible to her heirs.[3] Sunnud from Government. Enfranchised inam.

Acquisitions made by a woman before or after marriage by mechanical arts,[4] labour or skill.[5]

" Wealth earned by a woman by the mechanical arts during coverture does not, except in the Benares and Maharashtra school, become her *stridhana.*" [6]

The " Mitakshara " [7] adds, " which she may have acquired by inheritance, partition,[8] seizure, or finding." It also, after enumerating the different kinds of *stridhan,*[9] adds, " any other (separate acquisition)." [10] " Mitakshara."

The " Viramitrodaya " defines *stridhana* as property whereof a woman is the owner.[11] " Viramitrodaya."

This clearly does not include, except in Bombay,[12] property acquired by a woman by inheritance,[13] and Sir G. D. Banerjee [14] argues that the expression in " Yajnavalkya " was not intended to bear the full meaning attributed to it by the " Mitakshara."

Although women may not have an absolute interest in property acquired

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[1] Banerjee's " Hindu Law of Marriage," 3rd ed., p. 287. See, however, below.

[2] *Brij Indar Bahadur Singh* v. *Janki Koer (Ranee)* (1877), 5 I. A. 1; 1 C. L. R. 318.

[3] *Salemma* v. *Lutchmana Reddi* (1897), 21 Mad. 100; see *post*, p. 466.

[4] Such as painting and spinning, Macnaghten's " Hindu Law," vol. ii. p. 241.

[5] *Kandalam Rajagopalacharyulu* v. *Secretary of State* (1913), 38 Mad. 997, where the property was earned by the joint exertions of the husband and wife.

[6] Banerjee's " Law of Marriage," 3rd ed., pp. 322, 323.

[7] Chap. ii. s. xi. para. 2. See also " Vyavahara Mayukha," chap. iv. s. x. para. 26; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 260.

[8] See *ante*, pp. 331–336.

[9] Chap. ii. s. xi. para. 1.

[10] See also "Vyavahara Mayukha," chap. iv. s. x. para. 2.

[11] G. C. Sarkar's translation, p. 221. See also " Vyavahara Mayukha," as interpreted in Banerjee's " Hindu Law of Marriage," 3rd ed., p. 292.

[12] *Post*, p. 467.

[13] *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487; 9 W. R. P. C. 23; *Thakoor Deyhee (Mussumat)* v. *Baluk Ram (Rai)* (1866), 11 M. I. A. 139; 10 W. R. P. C. 4; 2 Ind. Jur. N. S. 106; *post*, pp. 464–466.

[14] " Hindu Law of Marriage," 3rd ed., pp. 289, 290.

by inheritance,[1] or partition,[2] the income of such property is at their disposal.[3]

There is nothing to prevent women owning property, even though it may not have been acquired in any of the modes enumerated by the ancient writers.

"We are not prepared to hold that the rules of Hindu law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject-matter of transactions at the time when the rules were first formulated." [4]

Investments.

Property purchased by a woman from funds, or from the proceeds of property to which she is absolutely entitled, or in exchange for property to which she is so entitled, belongs to her absolutely, and she can dispose of it by will or otherwise, whether it be movable or immovable.[5]

As to accumulations of income of inherited property, see *post*, pp. 474, 475.

As to a married woman's power to contract, see *ante*, p. 75.

Adverse possession.

Property acquired by adverse possession [6] is under the absolute control of a woman, and passes to her *stridhan* heirs.[7]

Power to deal with *stridhana*.

A woman's interest in her *stridhan* property is measured by her power to deal with it.

Maiden.

"During maidenhood, excepting the disqualification by reason of nonage, a Hindu female labours under no other incapacity as regards her power over her *stridhana*, and, except in the capacity of guardian, her father and her other relations have no control over it." [8] On her marriage she would retain the control over such property.

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[1] *Post*, pp. 464, 465.

[2] *Ante*, pp. 331–336.

[3] *Post*, p. 471.

[4] *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (1905), 33 Calc. 315, at p. 319; 10 C. W. N. 510, at p. 511.

[5] *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh* (1873), 19 W. R. C. R. 292; *Venkata Rama Rao* v. *Venkata Suriya Rau* (1877), 1 Mad. 281; S. C. on appeal (1880), 2 Mad. 333; 8 C. L. R. 304; *Madavarayya* v. *Tirtha Sami* (1877), 1 Mad. 307; *Nellaikumaru Chetti* v. *Marakathammal* (1876), 1 Mad. 166; *Subramanian Chetti* v. *Arunachelam Chetti* (1904), 28 Mad. 1.

[6] See *post*, p. 509.

[7] *Kanhai Ram* v. *Amri* (*Musammat*) (1910), 32 All. 189; *Mohim Chunder Sanyal* v. *Kashi Kant Sanyal* (1897), 2 C. W. N. 161.

[8] Banerjee's "Law of Marriage," 3rd ed., pp. 329, 457, 458.

Saudayika.

All property given[1] or bequeathed[2] to a woman by her husband, her relations, or his relations, before or after marriage,[3] is termed her "*saudayika*" (*lit.* gifts of affectionate kindred), and, except in the case of gifts by her husband,[4] is absolutely at her disposal.[5]

Property into which such property has been converted is also absolutely at her disposal.[6]

The testamentary power of a Hindu female is commensurate with her power of disposition in her lifetime.[7]

Gift of immovable property by husband to wife.

Except in cases to which the Hindu Wills Act, 1870, or the Oudh Estates Act, 1869, applies,[8] a gift or devise by the husband of immovable property[9] to his wife without express words creating an absolute interest, conveys only the interest of a widow.[10]

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[1] *Gosaien Chund Kobraj* v. *Kishenmunnee* (*Mussammaut*) (1836), 6 Ben. Sel. R. 77 (2nd ed., 90) (gift by a brother, and by a father's brother's son); *Doorga Koonwar* (*Mussamut*) v. *Tejoo Koonwar* (*Mussamut*) (1866), 5 W. R. M. R. 53 (gift by a son); *Madavarayya* v. *Tirtha Sami* (1877), 1 Mad. 307 (gift by father); *Jeewun Punda* v. *Sona* (*Mussumat*) (1869), 1 N. W. P. 66 (gift by husband); *Kashee Chunder Roy Chowdhry* v. *Gour Kishore Gooho* (1868); 10 W. R. C. R. 139 (ditto); *Venkata Rama Rao* v. *Venkata Suriya Rao* (1880), 2 Mad. 333; 8 C. L. R. 304 (ditto); *Radha* (*Mussumat*) v. *Bisheshur Dass* (1874), 6 N. W. P. 279 (ditto); *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (1905), 32 I. A. 181; 33 Calc. 23; 10 C. W. N. 1; 7 Bom. L. R. 904 (gift by brother); *Munia* v. *Puran* (1883), 5 All. 310 (acquired from brother); *Hurrymohun Shaha* v. *Shonatun Shaha* (1876), 1 Calc. 275 (gift by husband's father's sister's son); *Bhau* v. *Raghunath Krishna Gurav* (1905), 30 Bom. 229; 7 Bom. L. R. 936.

[2] *Damodar Madhowji* v. *Purmanandas Jeewandas* (1883), 7 Bom. 155 (legacy from husband); *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1873), 11 B. L. R. 286, at p. 295; 19 W. R. C. R. 264 (legacy from father); *Ramdulol Sircar* v. *Joymoney Dabey* (*Sreemutty*) (1816), Morley's "Digest," ii. 65.

[3] *Muthukaruppa Pillai* v. *Sellathammal* (1914), 39 Mad. 298.

[4] Banerjee's "Law of Marriage," 3rd ed., p. 328; *Teencowree Chatterjee* v. *Denonath Banerjee* (1865), 3 W. R. C. R. 49.

[5] See *post*, p. 443.

[6] *Venkata Rama Rao* v. *Venkata Suriya Rao* (1880), 2 Mad. 333; S. C. *Rowvenkata Mahapati* v. *Mohipati Suriah*, 8 C. L. R. 304.

[7] *Ibid.*

[8] *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (1909), 33 Mad. 91. *Post*, p. 443.

[9] With this is classed every kind of property producing a periodical income; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 265. Cf. *Sakharam Hari* v. *Laxmipriya Tirtha Swami* (1910), 34 Bom. 349; 12 Bom. L. R. 157; *Madhavrao Moreshwar* v. *Kashibai* (1909), 34 Bom. 287; 12 Bom. L. R. 9.

[10] *Saroda Sundari Dassi* v. *Kristo Jiban Pal* (1900), 5 C. W. N. 300; *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 378; *Koonjbehari Dhur* v. *Premchand Dutt* (1880), 5 Calc. 684; 5 C. L. R. 561; *Ram Narain Sing* v. *Pearay Bhugut* (1883), 9 Calc. 830; 13 C. L. R. 109; *Kullianbutti Koer* v. *Tulapal Singh* (1882), 11 C. L. R. 204, at p. 207; *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar*

This restriction has no application to movable property given by the husband, and invested by the wife in land,[1] and it is not extended to a case where a widow obtains an absolute estate by a compromise with her husband's relations.[2]

Power to alienate.

Provided there be a gift of an absolute estate,[3] and a power of alienation can be implied, the widow can alienate the property, although there is not an express power of alienation.[4] It is submitted that the gift of an absolute estate would ordinarily imply a power to alienate.

Presumption.

There is no presumption that a gift to a mother,[5] daughter,[6] or other female relation[7] confers a less estate than would have been conferred had she been a male, but in construing a will or deed giving property to a female it may be assumed that a Hindu knows, as a general rule, at all events, that women do not take absolute estates of inheritance which they are enabled to alienate,[8] and the Courts will lean against

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(1873), 10 B. L. R. 267; *Pabitra Dasi* v. *Damudar Jana* (1871), 7 B. L. R. 697; *Jamna Das* v. *Ramautar Pande* (1904), 27 All. 364; *Janki* v. *Bhairon* (1896), 19 All. 133; *Rudr Narain Singh* v. *Rup Kuar* (1878), 1 All. 734; *Gunput Singh (Baboo)* v. *Gunga Pershad* (1867), 2 Agra, 230; *Muthumeenakshi Ammal* v. *Chendra Sekhara Ayyar* (1902), 27 Mad. 498; *Seshayya* v. *Narasamma* (1899), 22 Mad. 357; *Gangadaraiya* v. *Parameswaramma* (1869), 5 Mad. H. C. 111; *Motilal Mithalal* v. *Advocate-General of Bombay* (1910), 35 Bom. 279; *Ambalal* v. *Rewa (Bai)* (1903), 5 Bom. L. R 334; *Kotarbasapa* v. *Chanverova* (1873), 10 Bom. H. C. 403; *Harilal* v. *Rewa (Bai)* (1895), 21 Bom. 376; "Daya-Bhaga," chap. iv. s. i. para. 23; "Smriti Chandrika," chap. ix. s. ii. para. 10; "Vyavahara Mayukha," chap. iv. s. x. para. 9; "Sarasvati Vilasa," paras. 257, 258. In *Bhujanga Rau* v. *Ramayamma* (1884), 7 Mad. 387, the Court held that although an absolute estate was given, there was no power of alienation. See *Surajmani (Musammat)* v. *Rabi Nath Ojha* (1907), 35 I. A. 17; 30 All. 84; 12 C. W. N. 231; 10 Bom. L. R. 59; *Kanhia* v. *Mahin Lall* (1888), 10 All. 495; *Jeewun Punda* v. *Sona (Mussumat)* (1869), 1 N. W. P. 66; *Seth Mulchand Badharsha* v. *Mancha (Bai)* (1883), 7 Bom. 491; *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 187; 30 Bom. 431, at p. 442; 10 C. W. N. 802, at p. 807; 8 Bom. L. R. 446; *Chunilal* v. *Muli (Bai)* (1900), 2 Bom. L. R. 46; *Jairam* v. *Kessowjee* (1902), 4 Bom. L. R. 555. See, however, *Braja Kishera* v. *Kundana Devi* (1899), 1 Bom. L. R. 287.

[1] *Venkata Rama Rao* v. *Venkata Suriya Rao* (1880), 2 Mad. 333; S. C. *Rowvenkata Mahapati* v. *Mohipati Suriah* (1880), 8 C. L. R. 304.

[2] *Sambasiva Ayyar* v. *Venkataswara, Ayyar* (1907), 31 Mad. 179; S. C. 30 Mad. 356.

[3] A mere direction that she is to remain in possession does not give an absolute estate: *Brij Lal* v. *Suraj Bikram Singh* (1912), 39 I. A. 150; 34 All. 405; 16 C. W. N. 745; 14 Bom. L. R. 827.

[4] See *Surajmani (Musammat)* v. *Rabi Nath Ojha* (1907), 35 I. A. 17; 30 All. 84; 12 C. W. N. 231; 10 Bom. L. R. 59; *Janki* v. *Bhairon* (1896), 19 All. 133, differing from *Koonjbehari Dhur* v. *Premchand Dutt* (1880), 5 Calc. 684; 5 C. L. R. 561; *Saroda Sundari Dassi* v. *Kristo Jiban Pal* (1900), 5 C. W. N. 300, at p. 303.

[5] *Atul Krishna Sircar* v. *Sanyasi Churn Sircar* (1905), 37 Calc. 1051; 9 C. W. N. 784.

[6] *Ramasami* v. *Papayya* (1893), 16 Mad. 466; *Kollany Kooer (Mussamut)* v. *Luchmee Pershad* (1875), 24 W. R. C. R. 395. See *Thakur Singh* v. *Nokhe Singh* (1901), 23 All. 309.

[7] *Ramjewan Lal (Lala)* v. *Dal Koer* (1897), 24 Calc. 406. In *Ramachandra Naiker* v. *Vijayaragavulu Naidu* (1908), 31 Mad. 349, there was an absolute gift to a daughter-in-law for her maintenance.

[8] *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7, at

a construction giving her such absolute right.[1] The circumstance that the beneficiary is a female may throw light upon the construction of a deed or will, but it cannot destroy the effect of express words creating an absolute estate.[2]

In a case governed by the Hindu Wills Act, 1870, or by the Oudh Estates Act, 1869, a mere devise of immovable property, even to a wife, passes an absolute estate, unless it appears from the will that only a restricted interest was intended for her.[3]

Control by husband.

Except in the case of *saudayika*,[4] and gifts by her husband, a woman's power of disposal over her *stridhan* property is, during coverture, subject to her husband's consent, and without such consent she cannot bequeath it by will when her husband survives her, unless he consents to the will.[5]

The "Smriti Chandrika" [6] says "it must be concluded that women possess independent power only over *saudayika* and over their husband's donation, except immovables, and that their power is not independent over other sorts of property, although they may be *stridhana*."

"Acquisitions made by a woman by the practice of a mechanical art are subject to the control of the husband, who appears to be entitled to the fruits of the wife's bodily labour." [7] That is, she cannot alienate it

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pp. 14, 15; 14 B. L. R. 226, at pp. 231, 232; 22 W. R. C. R. 409, at p. 410; *Radha Prosad Mullick* v. *Ranimoni Dassi* (1908), 35 I. A. 118, at p. 129; 35 Calc. 896, at p. 902; 12 C. W. N. 729, at p. 737; 10 Bom. L. R. 604; *Mathura Das* v. *Bhikan Mal* (1896), 19 All. 16; *Annaji Dattatraya* v. *Chandrabai* (1892), 17 Bom. 503; *Nunnu Meah* v. *Krishnasawmi* (1890), 14 Mad. 274; *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 578; *Seshaya* v. *Narasamma* (1899), 22 Mad. 357; *Lakshmibai* v. *Hirabai* (1886), 11 Bom. 69; S. C. on appeal, *Hirabai* v. *Lakshmibai* (1887), 11 Bom. 573; *Venkata Narasimha Appa Rao Bahadur (Rajah)* v. *Surenani Venkata Purushothama Jagannaddha Gopala Row Bahadur (Rajah)* (1908), 31 Mad. 321; cf. *Sambasiva Ayyar* v. *Visvam Ayyar* (1907), 30 Mad. 356; *Ganpat Rao* v. *Ram Chandar* (1888), 11 All. 296.

[1] *Harilal* v. *Rewa (Bai)* (1895), 21 Bom. 376, at pp. 380, 381.

[2] *Surajmani (Musammat)* v. *Rabi Nath Ojha* (1907), 35 I. A. 17; 30 All. 84; 12 C. W. N. 231; 10 Bom. L. R. 59. See *Ramachandra Naiker* v. *Vijayaraguvulu Naidu* (1908), 31 Mad. 349; *Amarendra Nath Bose* v. *Shuradhani Dasi* (1909), 14 C. W. N. 458.

[3] Acts XXI. of 1870, s. 2, and I. of 1869, s. 19, applying Act X. of 1865 (Ind. Succession Act), s. 82; *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 578; *Saroda Sundari Dassi* v. *Kristo Jiban Pal* (1900), 5 C. W. N. 300. See *Caralapathi Chunna Cunniah* v. *Cota Nammalwarriah* (1909), 33 Mad. 91.

[4] *Ante*, p. 441.

[5] *Bhau* v. *Raghunath Krishna Gurav* (1905), 30 Bom. 229; 7 Bom. L. R. 936. See Banerjee's "Law of Marriage," 3rd ed., p. 335.

[6] Chap. ix. s. ii. para. 12.

[7] G. C. Sarkar's "Hindu Law," 3rd ed., p. 365. See "Viramitrodaya" (G. C. Sarkar's translation), p. 222; "Vyavahara Mayukha," chap. ix. s. x. para. 7; "Daya-Bhaga," chap. iv. s. i. paras. 19, 20.

without his consent, and he can use it.[1] Katyana says: "The wealth which is earned by mechanical arts, or which is received through affection from a stranger, is subject to her husband's dominion. The rest is pronounced to be woman's property." [2]

Although there is no provision as to what is to become of "what is earned by mechanical arts or what is received through affection through a stranger," [3] where the woman predeceases her husband, Sir G. D. Banerjee considers that Jagannatha's opinion [4] should be followed, and that the property devolves upon the woman's *stridhan* heirs according to the "Mitakshara." [5]

Power of husband.

A husband can in times of pressing need,[6] and then only,[7] use his wife's *stridhana* of any kind without her consent.

His creditors have no such right.[8] He is bound if he has means to reimburse her for the amount so expended.[9]

Rights of widow.

With the above exception of immovable property given to her by her husband, and which she has not a power to alienate,[10] a widow has complete control over her *stridhan* property of every kind and whensoever acquired,[11] and can alienate it during her lifetime or by will.[12]

There is authority that in the case of immovable property given

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[1] Banerjee's "Law of Marriage," 3rd ed., p. 334.

[2] "Smriti Chandrika," chap. ix. s. i. para. 16; "Daya-Bhaga," chap. iv. s. i. para. 19; "Daya-Tattwa," chap. ix. para. 1; "Daya-Krama-Sangraha," chap. ii. s. ii. para. 25.

[3] *Ante*, pp. 438, 439.

[4] Colebrooke's "Digest," vol. iii. p. 629.

[5] "Law of Marriage," 3rd ed., pp. 458, 459.

[6] See *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184; *Tukaram* v. *Gunaji* (1871), 8 Bom. H. C. A. C. 129; "Mitakshara," chap. ii. s. 11, paras. 32, 33; "Daya-Bhaga," chap. iv. s. i. paras. 19–25; "Vivada Chintamoni" (Tagore's translation, pp. 264, 265; "Vyavahara Mayukha," chap. iv. s. x. paras. 7–10; "Smriti Chandrika," chap. ix. s. ii. para. 14; Banerjee's "Law of Marriage," 3rd ed., pp. 330–335.

[7] *Sooda Ram Doss* v. *Joogul Kishore Goopto* (1875), 24 W. R. C. R. 274; *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184.

[8] *Radha* (*Mussumat*) v. *Bisheshur Dass* (1875), 6 N. W. P. 279; *Tukaram* v. *Gunaji* (1871), 8 Bom. H. C. A. C. 129; *Hammuckah* v. *Rungapah* (1808), Strange's "Hindu Law," ii. 23.

[9] Banerjee's "Law of Marriage," 3rd ed., pp. 330–333.

[10] *Ante*, p. 441.

[11] Colebrooke's "Digest," vol. iii. p. 628; *Kullammal, Doe dem* v. *Kuppu Pillai* (1862), 1 Mad. H. C. 85; *Brij Indar Bahadur Singh* v. *Janki Koer* (*Ranee*) (1877), 5 I. A. 1, at p. 15; 1 C. L. R. 318, at pp. 325, 326; *Venkata Rama Rau* v. *Venkata Suriya Rau* (1877), 1 Mad. 281, at p. 286.

[12] *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (1878), 4 Calc. 1, at p. 6; 2 C. L. R. 422, at p. 425; *Nellaikumaru Chetti* v. *Marakathammal* (1876), 1 Mad. 166.

absolutely by the husband without an express or implied power of alienation, the widow has no testamentary power, and that it passes to her *stridhan* heirs.[1] There is nothing expressly said as to this in the Hindu law.[2] It is submitted that if the property is given absolutely, she can deal with it by will.

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[1] *Bhujanga Rau* v. *Ramayamma* (1884), 7 Mad. 387. The other authorities given in Mayne's "Hindu Law," 8th ed., pp. 541, 542, are distinguishable.

[2] Banerjee's "Law of Marriage," 3rd ed., p. 338.

CHAPTER XIV.

INHERITANCE TO STRIDHAN PROPERTY.

INHERITANCE to property held absolutely by a woman is not governed by the rules which govern inheritance to the property of a male.

It is only by the death of the woman that the heir succeeds; no one acquires by birth any interest in *stridhan* property.[1]

As to the inheritance to property which has been inherited by a woman from a male, see *ante*, p. 367, and *post*, p. 464.

Principle.

The inheritance to a woman's property varies to some extent according to the source from which the property comes. It depends upon express texts, and is founded on nearness of kin, preference being in some cases given to female descendants.

The doctrine of spiritual benefit has no application to the succession to *stridhana* in the Mitakshara school;[2] and even in the Bengal school that doctrine only applies to remote relations.[3]

When the form of the *stridhan* property has been changed by exchange, sale, or otherwise, succession to the proceeds will be the same as the succession to the original property.

Maiden's Property.

Maiden.

The schools do not differ as to the property of a maiden. It passes in the following order:—

1. Uterine brothers.
2. Mother.
3. Father.[4]

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[1] "Smriti Chandrika," chap. ix. s. iii. para. 9.

[2] *Ganga Jati (Musammat)* v. *Ghasita* (1875), 1 All. 46, at pp. 49, 50.

[3] *Ibid.; Toolsee Dass Seal* v. *Luckhymoney Dassee (Sm)* (1900), 4 C. W. N. 743; *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (1902), 30 Calc. 521, at p. 527; 7 C. W. N. 121, at p. 125.

[4] "Daya-Bhaga," chap. iv. s. iii. para. 7; "Mitakshara," chap. ii. s. xi. para. 30; "Smriti Chandrika," chap. ix. s. iii. para. 35; "Vyavahara

4. Her nearest relations,[1] the *sapindas* of the father being preferred to the mother's relations.[2]

Thus a sister is preferred to a father's brother's son,[3] and a father's mother's sister to a maternal grandmother,[4] and a stepmother to a mother's sister.[5] As to a paternal grandmother, see *Gandhi Maganlal* v. *Jadab (Bai)* (1899), 24 Bom. 192; 1 Bom. L. R. 574.

Under the Mitakshara, and the Mayukha, a father's sister in Bombay is preferred to a remote *sapinda.*[6]

When a maiden dies after betrothal, the bridegroom is entitled to the presents given by him after deducting all expenses incurred by himself or by the parent or other guardian of the damsel.[7] Failing the bridegroom, such presents are said to devolve upon her heirs,[8] as above. Presents by bridegroom.

Devolution of Stridhan according to the "Mitakshara."

Under the "Mitakshara," the property of a married woman devolves as follows :— Married woman's property.

I. *Sulka* [9] apparently goes first to the mother and then to the uterine brothers,[10] but it is not quite settled whether the mother does not succeed the brothers. Mitakshara. *Sulka.*

On this subject there is a difference of opinion as to the proper translation of a text of Gautama. According to the "Mitakshara" [11] and the "Mayukha," [12] it is translated: "The sister's fee belongs to the uterine

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Mayukha," chap. iv. s. x. para. 34; "Vivada Chintamani" (P. C. Tagore's translation), p. 270; *Narasayya* v. *Venkayya*, 2 Mad. L. J. 149, referred to in *Venkatarama Krishna Rau* v. *Bhujanga Rau* (1895), 19 Mad. 107, at p. 109.

[1] See *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy* (1914), 39 Calc. 319; 15 C. W. N. 1036.

[2] *Kamala* v. *Bhagirathi* (1912), 38 Mad. 45.

[3] *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy* (1911), 39 Cal. 319; 15 C. W. N. 1036.

[4] *Janglubai* v. *Jetha Appaji Marwadi* (1908), 32 Bom. 409; 10 Bom. L. R. 522; *Gandhi Maganlal* v. *Jadab (Bai)* (1899), 24 Bom. 192, at p. 212; 1 Bom. L. R. 574; "Viramitrodaya" (G. C. Sarkar's translation), p. 241. See Banerjee's "Law of Marriage," 3rd ed., p. 443.

[5] *Kamala* v. *Bhagirathi* (1912), 38 Mad. 45.

[6] *Tukaram* v. *Narayan* (1911), 36 Bom. 339; 14 Bom. L. R. 89.

[7] "Mitakshara," chap. ii. s. xi. paras. 34, 35; "Daya-Krama-Sangraha," chap. ii. s. i. para. 2; "Smriti Chandrika," chap. ix. s. iii. para. 34; "Vyavahara Mayukha," chap. iv. s. x. para. 33; Colebrooke's "Digest," iii. p. 624; Strange's "Hindu Law," vol. i. p. 38.

[8] "Vyavastha Darpana," 2nd ed., p. 733.

[9] *Ante*, pp. 436, 437.

[10] "Mitakshara," chap. ii. s. xi. para. 14, Colebrooke's note.

[11] Chap. ii. s. xi. para. 14.

[12] Chap. iv. s. x. para. 32. Sastri G. C. Sarkar ("Hindu Law," 3rd ed., p. 413) says: "The reason is that it originally belonged to the parents; but later on it was declared to be the bride's *stridhan ;* and this rule of succession appears to be a compromise between the original and the later views."

circumstances are such as would have justified an adoption by her husband, if alive.[1]

Thus she cannot adopt a boy whom her husband could not have adopted, and she cannot adopt so long as a son, son's son, son's son's son of her husband be in existence.[2] During that time her power of adoption is in suspense.[3] In the event of the son, grandson, or great-grandson dying unmarried, or leaving no son or widow behind him, the power, if it still be in existence,[4] can be exercised.[5]

No obligation to adopt.

A widow is under no legal obligation to exercise a power of adoption.[6] An express direction by the husband cannot be enforced,[7] even if he directed the adoption of a particular boy.[8] The widow does not, by the non-exercise of the power, forfeit any of her rights as widow,[9] or mother.[10]

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[1] *Puttu Lal* v. *Parbati Kunwar* (*Musammat*) (1915), 42 I. A. 155; 37 All. 359; 19 C. W. N. 841; 17 Bom. L. R. 549. See *ante*, p. 103.

[2] *Gopeelall* v. *Chundraolee Buhoojee* (*Mussamut Sree*), (1872), I. A. Sup. Vol. 131; 11 B. L. R. 391; 19 W. R. C. R. 12.

[3] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337.

[4] See *ante*, pp 130, 131.

[5] *Gavdappa* v. *Girimallappa* (1894), 19 Bom. 331, at p. 337; *Bykant Monee Roy* v. *Kisto Soonderee Roy* (1867), 7 W. R. C. R. 392. See *Vellanki Venkata Krishnâ Row* (*Rajah*) v. *Venkata Rama Lakshmi Narsayya* (1876), 4 I. A. 1; 1 Mad. 174; 26 W. R. C. R. 21.

[6] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Mutsaddi Lal* v. *Kundan Lal* (1906), 33 I. A. 55; 28 All. 377; 8 Bom. L. R. 371; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Pearee Dayee* (*Mussamut*) v. *Hurbunsee Kooer* (*Mussamut*) (1873), 19 W. R. C. R. 127; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, at p. 7; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25; *Rajcoomaree* (*Sreemutty*) v. *Nobocoomar Mullick* (1856), 1 Boul. 137; Sev. 641, note; *Dyamoyee Chowdhrain* v. *Rasbeharee Singh*, Ben. S. D. A. 1852, 1001, at p. 1013. See *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202.

[7] See *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

[8] See *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85. This question was suggested, but not decided, in *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190, and in *Shamavahoo* v. *Dwarkadas Vasanji* (1878), 12 Bom. 202, at p. 215.

[9] *Bamundoss Mookerjea* v. *Tarinee* (*Mussamut*) (1858), 7 M. I. A. 169, at p. 190; *Raman Ammal* v. *Subban Annavi* (1865), 2 Mad. H. C. 399; *Uma Sunduri Dabee* v. *Sourobinee Dabee* (1881), 7 Calc. 288; 9 C. L. R. 83; *Lakshmana Rau* v. *Lakshmi Ammal* (1881), 4 Mad. 160; *Prasannamayi Dasi* v. *Kadambini Dasi* (1868), 3 B. L. R. O. C. 85; *Deeno Moyee Dossee* (*Sreemutty*) v. *Doorga Pershad Mitter* (1865), 3 W. R. M. A. 6, at p. 7; *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachurn Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note; *Dino Moyee Chowdhrain* v. *Rehling* (1865), 2 W. R. M. A. 25.

[10] *Deeno Moyee Dossee* (*Sreemutty*) v. *Tarachund Koondoo Chowdhry* (1865), Bourke, A. O. C. 48; 3 W. R. M. A. 7, note.

It has been held that comparative poverty is the only criterion settling the claims of daughters *inter se*.[1] In one case [2] the Bombay High Court directed an issue as to whether the peculiar circumstances of the daughters—one being a widow, and the other married—were so far different as to give the widow a prior right of inheritance over the daughter whose husband was alive, on the ground that she was an "unprovided" daughter.

Sir G. D. Banerjee [3] says that "barren and childless widowed daughters are actually preferred to those who have or are likely to have male issue, when the means and circumstances of the competitors are equal."

The rule as to the preference of unendowed before endowed daughters cannot be extended to other female relations such as sisters in Bombay.[4]

Right of survivors.

It has been held in Madras that, where several daughters inherit *stridhan* property, on the death of one her interest passes to the survivors [5] as heirs of their mother. This is disputed by Sir G. D. Banerjee,[6] who points out that sons inheriting their mother's *stridhana* take as tenants in common without any right of survivorship.[7]

A prostitute daughter would apparently come after all other daughters.[8]

Daughter's daughter.

4. Daughter's daughter.[9]

They take *per stirpes*.[10]

Daughter's son.

5. Daughter's son.[11]

Son.

6. Son.[12]

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[1] *Poli* v. *Narotum Bapu* (1869), 6 Bom. H. C. A. C. 183; *Audh Kumari* v. *Chandra Dai* (1879), 2 All. 561.

[2] *Bakubai* v. *Manchhabai* (1864), 2 Bom. H. C. 5, followed in *Poli* v. *Narotum Bapu* (1869), 6 Bom. H. C. A. C. 183.

[3] "Law of Marriage," 3rd ed., pp. 358, 359.

[4] *Bhagirthibai* v. *Baya* (1881), 5 Bom. 264.

[5] *Sengamalathammal* v. *Valaynda Mudali* (1867), 3 Mad. H. C. 312, at p. 317.

[6] "Law of Marriage," 3rd ed., pp. 362, 363.

[7] *Karuppai Nachiar* v. *Sankaranayan Chetty* (1903), 27 Mad. 300; *Parson* (*Bai*) v. *Somli* (*Bai*) (1912), 36 Bom. 424; 14 Bom. L. R. 400, see *ante*, p. 254.

[8] See *Tara* v. *Krishna* (1907), 31 Bom. 495; 9 Bom. L. R. 774, *post*, p. 463, and *ante*, p. 388.

[9] "Mitakshara," chap. ii. s. xi. para. 15; "Smriti Chandrika," chap. ix. s. iii. para. 21; "Manu," chap. ix. para. 193; *Subramanian Chetti* v. *Arunachelam Chetti* (1904), 28 Mad. 1.

[10] "Mitakshara," chap. ii. s. xi. para. 16, *ante*, p. 367; W. Macnaghten's "Hindu Law," p. 121.

[11] "Mitakshara," chap. ii. s. xi. para. 18; "Vyavahara Mayukha," chap. iv. s. x. para. 20. Sir G. D. Banerjee's "Law of Marriage," 3rd ed., pp. 364, 365, considers that this does not include the adopted son of a daughter.

[12] *Karuppai Nachiar* v. *Sankaranaryanan Chetty* (1903), 27 Mad. 300; "Mitakshara," chap. ii. s. xi. para. 19. The difference between the Benares and the Bengal school (*post*, p. 457) in the rights of sons arises from different constructions of "Manu," chap. ix. para. 192. See Banerjee's "Law of Marriage," 3rd ed., pp. 366, 367. As to the rights of an adopted son, see *ante*, p. 181. The share of an adopted son in case of the birth of a legitimate son after the adoption, is apparently the same as in the case of inheritance to males (*ante*, pp. 187, 188; Banerjee's "Law of Marriage, 3rd ed., pp. 364, 365).

As to stepsons, see *post*, p. 454. "Sons" exclude son's sons, whose father is dead.

It has been held that there is no benefit of survivorship between co-heirs inheriting *stridhan* property, and that sons take as tenants in common, not as joint tenants, even if they be members of a joint Mitakshara family;[1] but it is submitted that where the sons, or other male co-heirs, hold the property jointly and are members of a Mitakshara joint family, there is a right of survivorship.[2]

Son's son.

7. Son's son.[3]

Grandsons by different sons inherit *per stirpes* and not *per capita.*[4]

There is authority that the adopted son of a natural son in competition with another natural son takes only the share which his father would have had had he been an adopted son.[5]

Succession to childless woman.

The succession to a childless woman depends upon the form of the woman's marriage.

If married in *Brahma* form.

If she has been married in the *Brahma* form,[6] and the marriage will be presumed as being in that form[7] (even in the case of Sudras if the parties belong to a respectable family),[8] the property goes to her husband,[9] and after him to his nearest *sapindas*, in order[10] of their rights of succession to him.

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[1] *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (1903), 27 Mad. 300; *Parson (Bai)* v. *Somli (Bai)* (1912), 36 Bom. 424; 14 Bom. L. R. 400.

[2] See *Venkayamma Garu (Raja Chelikani)* v. *Venkataramanayamma (Raja Chelikani)* (1902), 29 I. A. 156, at p. 165; 25 Mad. 678, at p. 687; 7 C. W. N. 1, at p. 8; 4 Bom. L. R. 657; *Katama Natchiar* v. *Shivagunga (Rajah of)* (1863), 9 M. I. A. 543, at p. 615; 2 W. R. P. C. 31, at pp. 39, 40; "Mitakshara," chap. i. s. iv. para. 2; Colebrooke's "Digest," vol. iii. p. 603; *ante*, pp. 238, 239.

[3] "Mitakshara," chap. ii. s. xi. para. 24.

[4] "Smriti Chandrika," chap. ix. s. iii. para. 25; "Vyavastha Chandrika," vol. ii. pp. 535, 552. See *ante*, p. 367.

[5] *Raghubanund Doss* v. *Sadhu Churn Doss* (1878), 4 Calc. 425; 3 C. L. R. 524; "Dattaka Chandrika" (Bharat Chandra Siromani's edition), p. 30, referred to in Banerjee's "Law of Marriage," 3rd ed., p. 373, note 6. See *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (1915), 43 I. A. 56; 40 Bom. 270; 18 Bom. L. R. 172.

[6] *Ante*, p. 54.

[7] *Jagannath Prosad Gupta* v. *Runjit Singh* (1897), 25 Calc. 354; *Authikesavulu Chetty* v. *Ramanujam Chetty* (1909), 32 Mad. 512. In *Moosa Haji Joonas* v. *Abdul Rahim Haji* (1905), 30 Bom. 197, at p. 203; 7 Bom. L. R. 147, Jenkins, C.J., said: "The legal consequences of the classes of marriage, the approved and the disapproved vary according as their leading characteristics are blameworthy or not, and suggest the inference that it is the quality and not the form of the marriage that decides the course of devolution." In that case a marriage by Cutchi Memons was treated as being in the approved form, and the same reasoning would apply to marriages by Brahmos and other Hindus, who do not marry according to strict Hindu forms.

[8] *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545.

[9] See *Bhau* v. *Raghunath* (1905), 30 Bom. 229; 7 Bom. L. R. 936. He takes before a stepson; *Bhimacharya* v. *Ramacharya* (1909), 33 Bom. 452; 11 Bom. L. R., p. 654.

[10] "Mitakshara," chap. ii. s. xi. para. 11; *Jagannath Prosad Gupta*

The order of succession after the husband is to some extent the subject of dispute.[1] Sir G. D. Banerjee [2] accepts Kamalakara's interpretation of the "Mitakshara," according to which "the successive heirs after the husband would be the stepson,[3] the step grandson,[4] the rival wife.[5] the step daughter,[6] her son, the husband's mother, his father, his brothers,[7] their sons,[8] and the husband's other *gotraja sapindas* and *bandhus* in the order in which they inherit his property."

The husband's sister's sons are preferred to the husband's paternal great grandfather's great grandsons,[9] and to the woman's own sister's sons.[10]

The husband's brother's daughter's son comes before the sister's daughter's son.[11]

A remote *sapinda* of the husband was held entitled to succeed in *Champat* v. *Shiba* (1886), 8 All. 393.

According to the "Mitakshara," the property would then go to the woman's blood relations,[12] but there is a question whether the *samanodakas* of the husband do not come before such relations.[13]

If married in *Asura* form.

If she has been married in the *Asura* form [14] (or apparently if in any local or special form [15]) the *stridhan* of a childless married woman goes to her mother, then to her father, and then to her father's next of kin,[16] and failing them to the mother's next of kin.[17]

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v. *Runjit Singh* (1897), 25 Calc. 354; *Champat* v. *Shiba* (1886), 8 All. 393; *Kanakammal* v. *Ananthamathi Ammal* (1912), 37 Mad. 293.

[1] G. D. Banerjee's "Law of Marriage," 3rd ed., pp. 375–377.

[2] *Ibid.*, p. 379.

[3] Natural and adopted stepsons take equally: *Gungadhur Bogla (Kumar)* v. *Hira Lal Bogla (Kumar)* (1916), 43 Calc. 944; 20 C. W. N. 489. In *Brahmappa* v. *Papanna* (1889), 13 Mad. 138, the stepson was preferred to the sister's son; "Smriti Chandrika," chap. ix. s. iii. para. 38. See, however, Mayne's "Hindu Law," 8th ed., p. 930.

[4] *Gojabai* v. *Shahajirao Maloji Raje Bhosle (Shrimant)* (1892), 17 Bom. 114.

[5] *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176; 30 Bom. 431; 10 C. W. N. 802; 8 Bom. L. R. 446, in preference to husband's brother or his son; *Krishnai* v. *Shripati* (1905), 30 Bom. 333; 8 Bom. L. R. 12, in preference to grandsons of husband's father's brother.

[6] *Nanja Pillai* v. *Sivabagyathachi* (1911), 36 Mad. 116. Sir G. D. Banerjee ("Law of Marriage," 3rd ed., p. 406) considers that stepdaughters come before stepsons.

[7] Full brothers being preferred to half-brothers, *Parmappa* v. *Shiddappa* (1906), 30 Bom. 607.

[8] *Bachha Jha* v. *Jugmon Jha* (1885), 12 Calc. 348 (a Mithila case).

[9] *Mohun Pershad Narain Singh* v. *Kishen Kishore Narain Singh* (1893), 21 Calc. 344 (a Mithila case).

[10] *Ganeshi Lal* v. *Ajudhia Prasad* (1906), 28 All. 345.

[11] *Venkatasubramaniam Chetti* v. *Thayarammah* (1898), 21 Mad. 263.

[12] Chap. ii. s. xi. para. 11; *Kanakammal* v. *Ananthamathi Ammal* (1912), 37 Mad. 293.

[13] Banerjee's "Law of Marriage," 3rd ed., pp. 393–396.

[14] *Ante*, p. 55.

[15] *Ante*, pp. 57, 58.

[16] *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy* (1911), 39 Calc. 119; 15 C. W. N. 1036.

[17] "Mitakshara," chap. ii. s. xi. para. 11. See *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244.

Nitya dvyamushyayana.

Where there is an understanding, or a previous stipulation between the giver and the receiver in adoption, that the boy should belong to both of them, the boy is said to be *nitya dvyamushyayana* [1] (*i.e.* perpetual or absolute son of two fathers).

Adoption of only son.

This arrangement can be made by a widow taking in adoption.[2]

The authorities show that where an only son has been adopted by a united brother of his father it is presumed that there was an arrangement that he was to be *dvyamushyayana.*[3] It does not seem to be very clear whether this rule applies only to the adoption of an only son of a brother, or whether it is applicable to all only sons.[4] It applies to adoption by widows of brothers.[5]

As it has now been held that an only son can be adopted in the *Dattaka* form,[6] the only advantage in adopting a boy as a *dvyamushyayana* is that the boy is not removed entirely from his natural family; but a boy so adopted could not secure the salvation of the person adopting as

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[1] See *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Opinions of pundits in *Haimun Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koomer*) (1834), 2 Knapp, 203, at pp. 206–288; *Joymoney Dossee* (*Sreemutty*) v. *Sibosoondry Dossee* (*Sreemutty*) (1837), Fulton, 75; *Shumshere Mull* (*Raja*) v. *Dilraj Konwur* (1816), 2 Ben. Sel. R. 189 (2nd ed., 216); 2 W. Macn. 192, 193; Strange's "Hindu Law," vol. i. p. 86; W. Macnaghten's "Hindu Law," vol. ii. 192; "Dattaka Mimansa," s. 6, para. 48; "Dattaka Chandrika," s. 2, para. 24.

[2] *Krishna* v. *Paramshri* (1901), 25 Bom. 537; 3 Bom. L. R. 73.

[3] *Basava* v. *Lingangauda* (1894), 19 Bom. 428, at p. 454; *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. *Contrà Laxmipatirao* v. *Venkatesh* (1916), 41 Bom. 315; 19 Bom. L. R. 23. See opinions of pundits in *Haimun Chull Sing* (*Raja*) v. *Gunsheam Sing* (*Koomer*) (1834), 2 Knapp, 203, at pp. 206–208; *Nilmadhub Doss* v. *Bishumber Doss* (1869), 13 M. I. A. 85, at pp. 100, 101; 3 B. L. R. P. C. 27, at p. 32; 12 W. R. P. C. 29, at p. 31.

[4] Mr. Mayne, in his "Hindu Law" (8th ed., p. 231), applies this rule only to the son of a brother. See also *Gocoolanund Dass* v. *Wooma Daee* (1875), 15 B. L. R. 405, at pp. 415, 416; 23 W. R. C. R. 340, at p. 341; S. C. on appeal, *Uma Deyi* (*Srimati*) v. *Gokoolanund Das Mahapatra* (1878), 5 I. A. 40, at pp. 50, 51; 3 Calc. 587, at p. 598; 2 C. L. R. 51, at p. 58. Sastri G. C. Sarkar ("Law of Adoption," p. 377) says, "It may no doubt be contended from what Nanda Pandita says in one passage that the gift of an only son is limited to the case of brothers. But in the very next passage ('Dattaka Mimansa,' ii. 39) he explains the principle of the adoption of an only son, which is applicable to all cases. And this general position is supported by what is said in the 'Mitakshara' with respect to the analogous case of a son produced by a man other than the brother on another man's wife. The 'Dattaka Chandrika,' however, does not appear to limit the *dvyamushyayana* adoption of an only son to the case of adoption by a paternal uncle only, but intimates it to be applicable to all cases" ("Dattaka Chandrika," ii. 28; iii. 17; v. 33). See also *Krishna* v. *Paramshri* (1901), 25 Bom. 537, at p. 542; 3 Bom. L. R. 73.

[5] See *Krishna* v. *Paramshri* (1901), 25 Bom. 537; 3 Bom. L. R. 73. It was not in that case necessary to raise any presumption, as the adoption was proved to have been in the *dvyamushyayana* form.

[6] *Ante*, p. 145.

grandsons, and great grandsons, even if there be daughters.[1] After them come daughters and their issue.

In those parts of the Bombay Presidency where the "Mayukha" is paramount, namely, in Gujarat, in the Northern Konkan, and in the island of Bombay, such inherited property as a woman takes absolutely[2] passes in the same way.[3]

In those parts of the Bombay Presidency where the "Mitakshara" is paramount, namely, in the Mahratta country and in the Southern Konkan and Northern Kanara, the property descends to the daughters to the exclusion of her sons.[4]

"It seems quite reasonable to lay down that as regards that class of property which is emphatically woman's property, being expressly so named by the old sages, the female offspring shall take precedence over the male; while as regards that which is not such, the general preference given to the male offspring over female by Hindu law should have effect. On the other hand, there is no obvious reason why in the case of collateral relations any similar distinction should be maintained between the two classes."[5]

In the case of *stridhan* of all kinds[6] the succession to a childless woman depends upon the form of the woman's marriage. Succession to childless woman.

If she has been married in the *Brahma* form,[7] and there be no issue of the marriage,[8] the property goes to her husband; and failing him, to his *sapindas* in the order in which they inherit to him.[9] If married in *Brahma* form.

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1 "Vyavahara Mayukha," chap. iv. s. x. para. 26; *Manilal Rewadat* v. *Rewa (Bai)* (1892), 17 Bom. 759; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at pp. 260, 261.

2 *Post*, p. 467.

3 "Vyavahara Mayukha," chap. iv. s. x. para. 26; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 261; *Bhagirthibai* v. *Kahnujirav* (1886), 11 Bom. 285, at pp. 303, 310; *Gandhi Maganlal Motichand* v. *Jadab (Bai)* (1899), 24 Bom. 192; 1 Bom. L. R. 574; *Gulappa Domingappa Kusugal* v. *Tayawa* (1907), 31 Bom. 453; 9 Bom. L. R. 834.

4 *Jankibai* v. *Sundra* (1890), 14 Bom. 612; *Gulappa Domingappa Kusugal* v. *Tayawa* (1907), 31 Bom. 453. See *ante*, pp. 448, 449, as to inheritance according to the Mitakshara.

5 *Manilal Rewadat* v. *Rewa (Bai)* (1892), 17 Bom. 758, at pp. 769, 770.

6 *Ibid.*, at p. 769. See *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at p. 260.

7 *Ante*, p. 54. As to Cutchi Memons, see *Moosa Haji Joonas Noorani* v. *Abdul Rahim (Haji)* (1905), 30 Bom. 197; 7 Bom. L. R. 447.

8 *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545.

9 "Vyavahara Mayukha," chap. iv. s. x. paras. 28, 30; *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 197; 30 Bom. 431, at pp. 451, 452; 10 C. W. N. 802, at pp. 813, 814; 8 Bom. L. R. 446; *Bachha Jha* v. *Jugmon Jha* (1885), 12 Calc. 348, at p. 355. This will include the wives of *gotraja sapindas* (*ante*, pp. 412, 413), see *Narmada (Bai)* v. *Bhagwantrai* (1888), 12 Bom. 505.

The above has been deduced from the view expressed in *Manilal Rewadat* v. *Rewa (Bai)* [1] that, except so far as the succession of children is concerned, there is, according to the "Mayukha," no difference between the succession to the different kinds of *stridhan* property. Earlier cases had held that in the case of inherited property the property devolved (independently of the form of marriage) as if the deceased woman were a male [2] and the only son of her father. This would coincide with the succession in the case of the marriage being in the *Asura* form.[3]

The husband's son is preferred to the co-widow and to the husband's nephew.[4] The husband's brother comes before the husband's brother's son.[5]

A co-widow comes before the husband's brother or brother's son,[6] and a daughter-in-law before the daughter of a deceased daughter.[7]

The son of a stepdaughter is an heir of the widow.[8]

As the "Mitakshara" and the "Mayukha" include in the expression "*sapinda*" any relation within the seventh degree from descent from a common ancestor,[9] kinsmen up to that degree will succeed.[10] There is authority that a daughter's grandson and a husband's sister are heirs.[11]

It is unsettled whether *samanodokas* [12] succeed, but Sir G. D. Banerjee [13] inclines to the opinion that they will so succeed.

Where there is a failure of the husband's relations, Messrs. West and Bühler [14] consider that her own relations succeed, whether before or after her husband's *samanodokas* it is not clear. Sir G. D. Banerjee inclines to the same opinion.[15]

A father's sister is preferred to a mother's brother,[16] and a father's sister's son to a father's sister's son's son.[17]

If married in *Asura* form.

If the woman was married in the *Asura* (or apparently in any local or special) form of marriage, the property goes to

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[1] (1892), 17 Bom. 758, at pp. 761, 765.

[2] *Narmada (Bai)* v. *Bhagwantrai* (1888), 12 Bom. 505; *Dalpat Narotam* v. *Bhagvan Khushal* (1885), 9 Bom. 301, at p. 304; *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at pp. 260, 261. See also Mayne's "Hindu Law," 8th ed., p. 864.

[3] Below.

[4] *Gojabai* v. *Shahajirao Maloji Raje Bhosle (Shrimant)* (1892), 17 Bom. 114.

[5] *Hunsraj* v. *Monghibai (Bai)* (1905), 7 Bom. L. R. 622.

[6] *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176; 30 Bom. 431; 10 C. W. N. 802; 8 Bom. L. R. 446.

[7] *Narmada (Bai)* v. *Bhagwantrai* (1888), 12 Bom. 505.

[8] *Motiram Succram* v. *Mayaram Barkatram*, Bom. P. J. for 1880, p. 119.

[9] "Mitakshara," chap. ii. s. v. para. 6; "Vyavahara Mayukha," chap. iv. s. viii. paras. 18, 19. See *ante*, p. 379.

[10] Banerjee's "Law of Marriage," 3rd ed., p. 393.

[11] West and Bühler, 2nd ed., pp. 242, 243.

[12] *Ante*, pp. 379, 380.

[13] "Law of Marriage," 3rd ed., pp. 393, 394.

[14] "Hindu Law," 2nd ed., pp. 244 *et seq.*

[15] "Law of Marriage," 3rd ed., pp. 395, 396.

[16] *Vijiarangam* v. *Lakshuman* (1871), 8 Bom. H. C. O. C. 244, at pp. 260, 261.

[17] *Dalpat Narotam* v. *Bhagvan Khushal* (1885), 9 Bom. 301.

her mother, then to her father;[1] and failing them, to her father's *sapindas* in order of their succession to him.

Devolution of Stridhan according to the "Smriti Chandrika."

"Smriti Chandrika."

According to the "Smriti Chandrika," which is of considerable authority in Southern India,[2] the *stridhan* property of a married woman devolves as follows :—

Sulka.

I. The *sulka* goes to the uterine brothers in preference to the mother.[3]

If the woman has issue.

Gifts by relations after marriage. Gifts by husband.

II. The *Anwadeya* (or *Anwadeyika*) *stridhana*[4] and the *pritidatta stridhana*[5] devolve, as in the case of the "Mayukha,"[6] except that widowed daughters are excluded from inheriting this kind of *stridhan*,[7] and that widows of *gotraja sapindas* have none of the rights which they have under the Bombay system.[8]

III. *Yautaka*.[9]

This goes first to the maiden daughter and subsequently as under the "Mitakshara."[10]

IV. Other kinds of *stridhan*.

The daughters who are unmarried and those who are "unprovided for"[11] first succeed,[12] the subsequent succession being as under the "Mitakshara."[13]

Under the Madras system the widows of *gotraja sapindas* do not take,

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[1] "Vyavahara Mayukha," chap. iv. s. x. para. 28; "Mitakshara," chap. ii. s. xi. para. 11; *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 197; 30 Bom. 431, at pp. 451, 452; 10 C. W. N. 802, at pp. 813, 814; 8 Bom. L. R. 446.

[2] It does not supersede the "Mitakshara," *Raju Gramany* v. *Ammani Ammal* (1906), 29 Mad. 358; *ante*, p. 17.

[3] "Smriti Chandrika," chap. iv. s. iii. para. 33; cf. *ante*, pp. 447, 448, 452, and *post*, pp. 456, 460.

[4] Gifts subsequent to marriage, see *ante*, p. 437.

[5] Gifts by husband on account of affection, *ante*, p. 438.

[6] *Ante*, p. 452; "Smriti Chandrika," chap. ix. s. iii. paras. 1–11; Banerjee's "Law of Marriage," 3rd ed., pp. 402, 403.

[7] "Smriti Chandrika," chap. ix. s. iii. para. 9.

[8] *Ante*, pp. 412, 413, 454; *Thayammal* v. *Annamalai Mudali* (1895), 19 Mad. 35; *Bandam Settah* v. *Bandam Maha Lakshmy* (1868), 4 Mad. H. C. 180.

[9] Gifts at the time of marriage.

[10] *Ante*, pp. 448–450.

[11] *Ante*, pp. 448, 449.

[12] "Smriti Chandrika," chap. ix. s. iii. para. 17.

[13] *Ante*, pp. 448–450; "Smriti Chandrika," chap. ix. s. iii. paras. 20–24, 29–32.

therefore neither the brother's widow [1] nor the daughter-in-law [2] takes as heir.

"On the subject of succession to *stridhana*, the Madhaviya commentary [3] generally follows the "Mitakshara," differing from it only in the enumeration of the heirs after the husband and the parents." [4]

Devolution of Stridhan according to the Mithila School.

Mithila school. According to the Mithila school the succession to a married woman is as follows:—

Sulka. I. *Sulka* goes first to the uterine brothers, then to the mother, and then to the father.[5]

II. Nuptial gifts (*parinayya*), which are described as "furniture, such as a mirror, combs, and so forth," are shared by the daughters; and failing them, by the sons.[6]

This apparently applies to all *yautaka stridhan*—at any rate, in the case of the woman being married in the *Brahma* form.[7]

Other *stridhan*. III. Other kinds of *stridhan* property are shared by the sons and unmarried daughters equally.[8]

Daughters who are "unprovided for" [9] apparently take as if they were unmarried.[10] Failing daughters, sons apparently succeed.[11] According to the "Ratnakara," [12] daughter's daughters and daughter's sons come before sons.

Childless woman. The succession to a childless woman is as in accordance with the "Mitakshara." [13]

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[1] *Thayammal* v. *Annamalai Mudali* (1895), 19 Mad. 35; *Kanakammal* v. *Ananthamathi Ammal* (1912), 37 Mad. 293.

[2] *Bandam Settah* v. *Bandam Maha Lakshmy* (1868), 4 Mad. H. C. 180.

[3] *Ante*, p. 17.

[4] Banerjee's "Law of Marriage," 3rd ed., p. 398.

[5] "Vivada Chintamani" (P. C. Tagore's translation), p. 270.

[6] *Ibid.*, pp. 268, 269.

[7] *Ibid.*, p. 268.

[8] *Ibid.*, p. 266.

[9] *Ante*, pp. 448, 449.

[10] See "Vivada Chintamani" (P. C. Tagore's translation), p. 267.

[11] *Ibid.*, p. 268.

[12] Table of succession in Tagore's translation of "Vivada Chintamani," p. xcvi.

[13] *Ante*, pp. 450, 451; "Vivada Chintamani" (P. C. Tagore's translation), p. 269. See *Bachha Jha* v. *Jugmon Jha* (1885), 12 Calc. 348. The construction of Brihaspati's text by the Judicial Committee in *Kesserbai (Bai)* v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 197; 30 Bom. 431, at pp. 451, 452; 10 C. W. N. 802, at pp. 813, 814; 8 Bom. L. R. 446, will apply to Mithila cases. This view does not agree with the views expressed in *Mohun Pershad Narain Singh* v. *Kishen Kishore Narain Singh* (1893), 21 Calc. 344.

According to the "Madana Parijata," [1] a co-wife's daughter or daughter's son is an heir.

According to the Mithila school, the sons of half sisters succeed.[2]

A son adopted by a woman according to the *Kritrima* form inherits her *stridhan* property.[3] *Kritrima* adoption.

Devolution of Stridhan according to the Bengal School.

The property (except the *sulka*) [4] of a married woman having children devolves as follows :— Bengal school.

I. *Yautaka stridhan.*[5] *Yautaka.*

1. Unbetrothed daughters.
2. Betrothed daughters.[6]
3. Married daughters having, or likely to have, male issue.[7]
4. Barren and childless widowed daughters.[8]
5 Sons.[9]
6. Daughter's sons.[10]

The son of a daughter's son [11] and a daughter's daughter [12] do not succeed to *stridhan* property according to the Bengal school.

7. Son's son.
8. Son's grandson in the male line.[13]
9. Stepson.[14]
10. Son's son of a co-wife.

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[1] Table of Succession in P. C. Tagore's translation of "Vivada Chintamani," p. xvci.

[2] *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at pp. 27, 28; (2nd ed., 29, at p. 35).

[3] See *ante*, pp. 201, 202.

[4] *Post*, p. 460.

[5] *Ante*, p. 435.

[6] "Daya-Bhaga," chap. iv. s. ii. para. 23; "Daya-Krama Sangraha," chap. ii. s. iii. para. 5.

[7] This includes a widow having a dumb son who is incompetent to inherit (*ante*, pp. 370, 371), *Charu Chunder Pal* v. *Nobo Sunderi Dasi* (1891), 18 Calc. 327.

[8] Note to "Daya-Bhaga," chap. iv. para. 23 (Colebrooke's translation); "Daya-Krama Sangraha," chap. ii. s. iii. paras. 5, 7. See Colebrooke's "Digest," vol. iii. pp. 597, 602, 603.

[9] "Daya-Bhaga," chap. iv. s. ii. paras. 13, 17–20. This includes adopted sons, see *ante*, p. 181.

[10] "Daya-Krama Sangraha," chap. ii. s. iii. para. 9.

[11] "Daya-Bhaga," chap. iv. s. ii. para. 34; "Daya-Krama Sangraha," chap. ii. s. vi. para. 2.

[12] Banerjee's "Law of Marriage," 3rd ed., p. 429; *Srinath Gangopadhya* v. *Sarbamangula Debi* (1868), 2 B. L. R. A. C. 144; 10 W. R. C. R. 488; *Madhumala Dassi (Srimati)* v. *Lakshan Chandra Pal* (1913), 20 C. W. N. 627. As to the "Mitakshara," see *ante*, p. 449.

[13] "Daya-Bhaga," chap. iv. s. ii. paras. 17–21; "Daya-Krama Sangraha," chap. ii. s. iii. para. 10.

[14] "Daya-Bhaga," chap. iv. s. iii. para. 32; "Daya-Krama Sangraha," chap. ii. s. iii. para. 11.

11. Son's son's son of a co-wife.[1]

Given by father.

II. Property given to a woman by her father at any time other than at the time of the marriage (*Pitridatta ayautaka stridhana*).[2]

1. The unmarried daughter.[3]
2. Son.[4]
3. The daughter having or likely to have a son.
4. Daughter's son.
5. Son's son.[5]
6. Son's son's son.
7. Son of co-wife.
8 Co-wife's son's son.
9. Co-wife's son's son's son.
10. Barren daughter, and sonless widowed daughter.[6]

According to Dr. Jogendranath Bhattacharya,[7] "all the general rules relating to *Yautaka* and *Ayautaka* property apply also to the *Pitridatta*, excepting only so far as they are modified by the special rule that the unmarried daughter alone inherits the *Pitridatta* in the first instance." According to Sir G. D. Banerjee,[8] "the order given in the 'Daya-Krama Sangraha' is the same as that for the *Yautaka*; and it seems to be in accordance with the opinions of Jimutavahana and of Raghunandana."

III. Other *stridhan* property.[9]

1. The son and maiden (unbetrothed)[10] daughter.[11]

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[1] "Daya-Krama Sangraha," chap. ii. s. iii. para. 13; "Vyavastha Darpana," 2nd ed., p. 714.

[2] "Daya-Bhaga," chap. iv. s. ii. para. 16; explained in *Prosanno Kumar Bose* v. *Sarat Shoshi Ghosh* (1908), 36 Calc. 86; 12 C. W. N. 924.

[3] This has been held not to include a betrothed daughter, *Srinath Gangopadhya* v. *Sarbamangala Debi* (1868), 2 B. L. R. A. C. 144; 10 W. R. C. R. 488.

[4] *Prosanno Kumar Bose* v. *Sarat Shoshi Ghosh* (1908), 36 Calc. 86; 12 C. W. N. 924.

[5] This is according to Colebrooke's translation. According to Siromani's translation, a son's son comes before a daughter's son; Banerjee's "Law of Marriage," 3rd ed., pp. 426, 427.

[6] Srikrishna in the "Daya-Krama Sangraha," chap. ii. s. v. p. 3, places these daughters before sons, but this order is not in accordance with the same author's commentary on the "Daya-Bhaga" (end of chap. iv.); see *Prosanno Kumar Bose* v. *Sarat Shoshi Ghosh* (1908), 36 Calc. 86, at p. 105; 12 C. W. N. 924, at p. 936; *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (1905), 33 Calc. 315, at p. 325; 10 C. W. N. 510, at p. 516.

[7] "Hindu Law," 2nd ed., pp. 594–596.

[8] "Law of Marriage," 3rd ed., p. 426.

[9] "Daya-Bhaga," chap. iv. s. ii. paras. 1–12; "Daya-Krama Sangraha," chap. ii. s. iv. paras. 1–10.

[10] *Srinath Gangopadhya* v. *Sarbamangala Debi* (1868), 2 B. L. R. A. C. 144; 10 W. R. C. R. 488. See, however, Colebrooke's "Digest," vol. iii. p. 590.

[11] *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (1905), 32 I. A. 181; 33 Calc. 23; 10 C. W. N. 1; 7 Bom. L. R. 904.

2. The married daughter having, or who may have, male issue.[1]

3. Son's son.[2]

4. Daughter's son.[3]

5. Son's son's son.

6. The son of a rival wife.[4]

7. Her son's son.

8. Her son's son's son.

9. A barren daughter or sonless widowed daughter.[5]

According to the "Daya-Bhaga," [6] the barren and widowed daughters come after the daughter's son. Raghunandana [7] and Srikrishna [8] place the son's grandson after the daughter's son, and Srikrishna also interposes the son, grandson, and great grandson (in the male line) of a rival wife between the son's grandson and the barren and widowed daughter. Srikrishna's views are said to be usually accepted in this matter.[9]

Where a woman has left no children, or stepsons or their male issue, the next group of heirs consist of her parents, her brothers, and her husband. Succession to childless woman.

I. Property given to her by her parents during maidenhood, and gifts from her husband's family [10] and from her own family subsequent to marriage (*anwadeya*),[11] devolve on— Gifts during maidenhood and subsequent to marriage.

1. Whole [12] brother.

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[1] "Daya-Bhaga," chap. iv. s. ii. para. 9.

[2] "Daya-Bhaga," chap. iv. s. ii. para. 11.

[3] *Ibid.*, para. 10.

[4] *Gosaien Chund Kobraj* v. *Kishenmunnee* (1836), 6 Ben. Sel. R. 77 (new edition, 90). Sastri G. C. Sarkar ("Hindu Law," 3rd ed., p. 415) puts him after a son's son, and before a daughter's son.

[5] "Vyavastha Darpana," 2nd ed., p. 733.

[6] Chap. iv. s. ii. para. 12; G. C. Sarkar's "Hindu Law," 3rd ed., p. 415.

[7] G. C. Sarkar's translation of the "Daya-Tattwa," p. 53.

[8] Srikrishna's Commentary on the "Daya-Bhaga," chap. iv. s. iii.; "Daya-Krama Sangraha," chap. ii. s. iv. para. 9.

[9] Banerjee's "Law of Marriage," 3rd ed., pp. 419, 420; S. C. Sircar's "Vyavastha Darpana," 2nd ed., p. 718; W. Macnaghten's "Hindu Law," vol. i. p. 39.

[10] *Hurrymohun Shaha* v. *Shonatun Shaha* (1876), 1 Calc. 275; "Daya-Bhaga," chap. iv. s. iii. paras. 10, 29.

[11] *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdry* (1873), 11 B. L. R. 286; 19 W. R. C. R. 264; S. C. (1871), 16 W. R. C. R. 105 (gift by father before marriage); *Gopal Chandra Pal* v. *Ram Chandra Pramanik* (1901), 28 Calc. 311 (gift by father after marriage); *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (1905), 33 Calc. 315; 10 C. W. N. 510 (Do.); *Mahendra Nath Maity* v. *Giru Chandra Maity* (1915), 19 C. W. N. 1287 (gift by brother after marriage); "Daya-Bhaga," chap. iv. s. iii. paras. 10, 29.

[12] *Debiprasanna Roy Chowdhry* v. *Harendra Nath Ghose* (1910), 37 Calc. 863; 15 C. W. N. 383.

2. Mother.
3. Father.
4. Husband.

Sulka devolves in the same way, whether the woman has left children or not.[1]

Other property.

II. Other *stridhan* property devolves as follows :—

(*a*) If she has been married in the *Brahma* form on—

1. Husband.[2]
2. Brother.
3. Mother.
4. Father.[3]

(*b*) Where the marriage is in the *Asura*, or apparently in a local or special form, the order is—

1. Mother.
2. Father.
3. Brother.
4. Husband.[4]

Subsequent succession to all property.

After the above heirs, according to the text-books, *stridhan* property of all kinds, and whatever be the form of marriage,[5] then devolves, according to the interpretation of Brihaspati's text, accepted by the "Daya-Bhaga," [6] on the sister's son,[7] husband's sister's son, husband's brother's son, brother's son, son-in-law, and husband's younger brother in the following order [8] :—

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[1] "Daya-Bhaga," chap. iv. s. iii. paras. 27, 28.

[2] *Bistoo Pershad Burral* v. *Radha Soonder Nath* (1871), 16 W. R. C. R. 115; S. C. *ibid.* 304; "Daya-Bhaga," chap. iv. s. iii. paras. 2, 4.

[3] "Daya-Krama Sangraha," chap. ii. s. iii. paras. 16, 17; Srikrishna's Commentary on the "Daya-Bhaga"; Macnaghten's "Hindu Law," vol. i. pp. 39, 50; "Vyavastha Darpana," 2nd ed., pp. 719, 720. The "Daya-Tattwa" places the mother before the brother (chap. x. para. 26).

[4] "Daya-Krama Sangraha," chap. ii. s. iii. paras. 19–22; Srikrishna's Commentary on the "Daya-Bhaga," chap. iv.

[5] "Vyavastha Darpana," 2nd ed., pp. 719, 720.

[6] Chap. iv. s. iii. para. 31. As to the interpretation of that text, see *Kesserbai* (*Bai*) v. *Hunsraj Morarji* (1906), 33 I. A. 176, at p. 197; 30 Bom. 431, at pp. 451, 452; 10 C. W. N. 802, at pp. 813, 814; 8 Bom. L. R. 446.

[7] This includes stepsister's son, *Dasharathi Kundu* v. *Bipin Behari Kundu* (1904), 32 Calc. 261; 9 C. W. N. 119; *Shashi Bhushan Lahiri* v. *Rajendra Nath Joardar* (1912), 40 Calc. 82; 16 C. W. N. 1094.

[8] "Daya-Bhaga," chap. iv. s. iii. paras. 37, 38; "Daya-Tattwa," chap. x. paras. 27–36; "Daya-Krama Sangraha," chap. ii. s. vi. paras. 1–9; Banerjee's "Law of Marriage," 3rd ed., pp. 437–439; *Bachha Jha* v. *Jugmon Jha* (1885), 12 Calc. 348, at p. 353.

1. Husband's younger brother.[1]
2. Son of husband's elder or younger brother.
3. Sister's son.
4. Husband's sister's son.
5. Brother's son.[1]
6. Daughter's husband.

It has been held that the son of a co-wife is to be preferred to the daughter's son of the paternal grandfather.[2]

The "Daya-Bhaga,"[3] distinctly repudiates the preference of any other persons, and after the above-named the Bengal school places the following :—

7. Father-in-law.
8. Husband's elder brother.[4]
9. Her father-in-law's great grandson in the male line.
10. The paternal grandfather of her husband or his issue.
11. The paternal great grandfather of her husband or his issue.[5]
12. The *sakulyas* and *samanodakas* of her husband in the same order as in the case of the property of males.[6]
13. The "Daya-Krama Sangraha" places next the *samanapravaras*,[7] which would apparently mean the *samanapravaras* of her husband.[8]

Jagannatha[9] places the woman's kindred on her father's side as far as the tenth degree, and after them the family of her mother after her husband's *samanodakas*, and makes no mention of the *samanapravaras*.

If the view of Brihaspati's text which has been adopted by the Judicial Construction of Brihaspati's text.

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[1] The husband's younger brother comes before the widow's stepbrother; *Debiprasanna Roy Chowdhry* v. *Harendra Nath Ghose* (1910), 37 Calc. 863; 15 C. W. N. 383. In *Toolsey Dass Seal* v. *Luckymoney Dassee* (1900), 4 C. W. N. 743, at p. 747, Sale, J., held "with diffidence" that a brother's son came before the husband's younger brother of the half blood.

[2] *Gosaien Chund Kobraj* v. *Kishenmunnee* (*Mussummaut*) (1836), 6 Ben. Sel. R. 77 (new edition, 90).

[3] Chap. iv. s. iii. para. 41.

[4] "Daya-Bhaga," chap. iv. s. iii. para. 39; "Daya-Tattwa," chap. x. para. 38; "Daya-Krama Sangraha," chap. ii. s. vi. para. 10.

[5] Colebrooke's "Digest," vol. iii. p. 623.

[6] "Daya-Krama Sangraha," chap. ii. s. vi. para. 11, as translated in Banerjee's "Law of Marriage," 3rd ed., pp. 440, 441, and Sircar's "Vyavastha Darpana," 2nd ed., p. 727.

[7] *Ibid.* The expression means persons descended from the same patriarch in the male line.

[8] Banerjee's "Law of Marriage," 3rd ed., p. 441.

[9] Colebrooke's "Digest," vol. iii. p. 623. See Banerjee's "Law of Marriage," 3rd ed., pp. 441, 442.

Committee in a Bombay case [1] is to be applied to the Bengal school, the succession, after the husband, father, mother, and brother will devolve, if the woman has been married in the *Brahma* form, on the heirs of her husband, and if she has been married in the *Asura* (or apparently if in a local or special form) falls upon the heirs of her father.

Escheat.

Failing all the above-named *stridhan* heirs, the Crown takes by escheat.[2]

The texts excepted the right of the Crown in the case of a Brahmani woman,[3] but this limitation is not now effectual.[4]

Illegitimate children.

Illegitimacy is not a bar to the succession of children to their mother's property,[5] but in a competition between legitimate and illegitimate children the rights of the former prevail.[6]

This has no application to the illegitimate child of a married woman.[7] As to the rights of children by different fathers, see *Arunagiri Mudali* v. *Ranganayaki Ammal* (1897), 21 Mad. 40.

Dancing-girls and prostitutes.

There is a conflict of authority as to the inheritance to the property of a dancing-girl attached to a pagoda, of a prostitute or of a woman who had become degraded by unchastity. The earlier cases in Madras related to dancing-girls attached to pagodas. The rights of their illegitimate issue to inherit, daughters taking before sons, were upheld by the Courts.[8]

This view has been accepted in Bombay.[9]

Strange [10] lays down the rule that on failure of issue the property of a dancing-girl will go to the pagoda to which she is attached. In the absence of custom there seems to be no real ground for this rule.[11]

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[1] *Kesserbai* (*Bai*) v. *Hunsraj Morarji* (1906), 33 I. A. 176; 30 Bom. 431; 10 C. W. N. 802; 8 Bom. L. R. 446.

[2] See "Daya-Krama Sangraha," chap. ii. s. vi. para. 13.

[3] "Daya-Krama Sangraha," chap. ii. s. vi. para. 12; Colebrooke's "Digest," vol. iii. p. 623.

[4] See *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1860), 8 M. I. A. 500; 2 W. R. P. C. 59; *ante*, p. 416.

[5] *Mayna Bai* v. *Uttaram* (1864), 2 Mad. H. C. 196, at p. 201; *Arunagiri Mudali* v. *Ranganayaki Ammal* (1897), 21 Mad. 40; Ghose's "Hindu Law," 2nd ed., 658; "Narada" (Jolly's translation, p. 96) says: "Let the damsel's son, born through his mother's folly, whose father is unknown, present the funeral cake to the father of his mother, and inherit his property."

[6] *Meenakshi* v. *Muniandi Panikkan* (1914), 38 Mad. 1144.

[7] *Jagannath Raghunath* v. *Narayan* (1910), 34 Bom. 553; 12 Bom. L. R. 545.

[8] *Kamakshi* v. *Nagarathnam* (1870), 5 Mad. H. C. 161; Strange's "Manual," p. 89, para. 361. See *Narasanna* v. *Gangu* (1889), 13 Mad. 133; *Arunagiri Mudali* v. *Ranganayaki Ammal* (1897), 21 Mad. 40.

[9] *Jaya Madhav* v. *Manjunath* (1916), 19 Bom. L. R. 320.

[10] "Manual," p. 89, para. 362.

[11] See Banerjee's "Law of Marriage," 3rd ed., pp. 407–412.

The difficulty arises as to other heirs. On the one hand it has been held that "with prostitutes, the tie of kindred being broken, none of their relations, who remain undegraded in caste, whether offspring or not, inherit from them. Their issue after their degradation succeed."[1] On the other hand, it has been held that "prostitution does not sever the legal relation, and therefore the degradation of a woman does not in law entail a cessation of the tie of kindred between her and the members of her natural family, or between her and the members of her husband's family,"[2] and that the ordinary rules of inheritance apply.[3] The better authority is in favour of the latter view.

In one case the right of the husband,[4] in another that of the stepson,[5] in a third the right of a daughter,[6] and in a fourth that of a brother's son[7] was maintained.

There may be a local custom or usage by which only degraded relations succeed.[8]

As to adoptions by dancing-girls and prostitutes, see *ante*, pp. 163, 164.

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[1] Strange's "Manual," p. 89, para. 363; *In the goods of Kamineymoney Bewah* (1894), 21 Calc. 697; *Tara Munee Dossea* v. *Motee Buneanee* (1846), 7 Ben. Sel. R. 273 (new edition, 325); *Narasanna* v. *Gangu* (1889), 13 Mad. 133, at p. 134; *Sivasangu* v. *Minal* (1889), 12 Mad. 277; *Mayna Bai* v. *Uttaram* (1864), 2 Mad. H. C. 196, at p. 203; *Tripura Charan Bannerjee* v. *Harimati Dassi* (1911), 38 Calc. 495; 15 C. W. N. 807.

[2] *Subbaraya Pillai* v. *Ramasami Pillai* (1899), 23 Mad. 171, approved of in *Narain Das* v. *Tirlok Tiwari* (1906), 29 All. 4; *Meenakshi* v. *Muniandi Panikkan* (1914), 38 Mad. 1144; *Hiralal Singha* v. *Tripura Charan Ray* (1913), 40 Calc. 650; 17 C. W. N. 679 (a Full Bench case), which now settles the law in Bengal. Cf. *ante*, p. 388. Sir Gurudas Banerjee in the "Law of Marriage and Stridhan," 4th ed., pp. 417–425, combats the view of the above Full Bench case.

[3] *Sarna Moyee Bewa* v. *Secretary of State* (1897), 25 Calc. 254; 2 C. W. N. 97; *Kamakshi* v. *Nagarathnam* (1870), 5 Mad. H. C. 161; Cunningham's "Digest," p. 112.

[4] *Narain Das* v. *Tirlok Tiwari* (1906), 29 All. 4.

[5] *Subbaraya Pillai* v. *Ramasami Pillai* (1899), 23 Mad. 171.

[6] *Tara* v. *Krishna* (1907), 31 Bom. 495.

[7] *Hiralal Singha* v. *Tripura Charan Roy* (1913), 40 Calc. 650; 17 C. W. N. 679.

[8] See *Sarna Moyee Bewa* v. *Secretary of State* (1897), 25 Calc. 254; 2 C. W. N. 97.

CHAPTER XV.

POWERS OF WOMEN OVER PROPERTY INHERITED BY THEM.

Limited powers of female heirs.

EXCEPT in certain cases in the Bombay Presidency,[1] a woman who succeeds as heir, whether to a male [2] or to a female,[3] has not complete dominion over the property inherited by her, so as to be able to alienate it otherwise than in case of necessity,[4] or to a certain extent for the spiritual welfare of the last full owner,[5] or in case of her validly accelerating the estate of the reversioner.[6] She does not become a fresh stock of descent, and on her death it passes to the then heir of the last full owner, *i.e.* to the person who would have been the heir of the last full owner, if such full owner had died simultaneously with the limited owner.[7]

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[1] *Post*, pp. 467, 468.

[2] Cases, *post*, p. 465, notes 4, 5, 7.

[3] (Benares school) *Sheo Shankar Lal* v. *Debi Sahai* (1903), 30 I. A. 202; 25 All. 468; 7 C. W. N. 831, reversing *Debi Sahai* v. *Sheo Shanker Lal* (1900), 22 All. 353; *Sheo Pertab Bahadur Singh* (*Lal*) v. *Allahabad Bank* (1903), 30 I. A. 209; 25 All. 476; 7 C. W. N. 840; 5 Bom. L. R. 833; *Chotay Lall* v. *Chunno Lall* (1878), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; S. C. in Court below (1874), 14 B. L. R. 235, at p. 237; *Thakoor Deyhee* (*Mussumat*) v. *Baluk Ram* (*Rai*) (1866), 11 M. I. A. 139; 10 W. R. P. C. 3; *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487; 9 W. R. P. C. 23; (Madras) *Venkatarama Krishna Rau* v. *Bhujanga Rau* (1895), 19 Mad. 107; *Virasangappa Shetti* v. *Rudrappa Shetti* (1895), 19 Mad. 110; *Sengamalathammal* v. *Valaynda Mudali* (1867), 3 Mad. H. C. 312; *Raju Gramany* v. *Ammani Ammal* (1906), 29 Mad. 358. (Bengal school) *Jagendra Chandra Banerjee* v. *Phani Bhushan Mookerjee* (1915), 43 Calc. 64; *Madhumala Dassi* (*Srimati*) v. *Lakshan Chandra Pal* (1913), 20 C. W. N. 627; *Prankissen Laha* v. *Noyanmoney Dassee* (*Sreemutty*) (1879), 5 Calc. 222; *Huri Doyal Singh Sarmana* v. *Grish Chunder Mookerjee* (1890), 17 Calc. 911; *Bhoobun Mohun Banerjee* v. *Muddon Mohun Sing* (1877), 1 Shome's L. R. C. R. 3; *Prankishen Sing* v. *Bhagwutee* (*Mussummaut*) (1793), 1 Ben. Sel. R. 4; "Daya-Krama Sangraha," chap. ii. s. iii. para. 6.

[4] *Post*, pp. 478 *et seq.*

[5] *Khub Lal Singh* v. *Ajodhya Misser* (1915), 43 Calc. 574, *post*, p. 480.

[6] *Post*, p. 490.

[7] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 154; 5 Calc. 776, at pp. 789, 790; 6 C. L. R. 322, at pp. 332, 333; *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543; 2 W. R. P. C. 31.

An estate similar to that acquired by a female heir may also be created by contract, or grant, or prescription,[1] or by will.[2]

In the case of *stridhan* property the *stridhan* heir of the woman from whom the deceased female inherited, will inherit, or in other words that what has once descended as *stridhan* does not so descend again.[3]

A widow's estate is not enlarged in the case of succession to tenancies by sec. 22 of the N. W. P. Tenancy Act, 1901 (Act II. N. W. P. C. of 1901); *Bisheshar Ahir* v. *Dukharan Ahir* (1916), 38 All. 197.

As to movable property, see *post*, pp. 469, 470.

Thus a widow,[4] a daughter[5] (except in Bombay[6]), a mother[7]

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[1] *Meda Vengamma* v. *Mitta Chelamaya* (1912), 36 Mad. 484.

[2] *Kullianbutti Koer* v. *Tulapal Singh* (1882), 11 C. L. R. 204; Phillips and Trevelyan's "Law relating to Hindu Wills," 2nd ed., pp. 88, 89.

[3] *Sheo Shankar Lal* v. *Debi Sahai* (1903), 30 I. A. 202; 25 All. 468; 7 C. W. N. 831; 5 Bom. L. R. 828; *Sheo Pertab Bahadur Singh* (*Lal*) v. *Allahabad Bank* (1903), 30 I. A. 209; 25 All. 276; 7 C. W. N. 840; *Huri Doyal Singh Sarmana* v. *Grish Chunder Mookerjee* (1890), 17 Calc. 911.

[4] *Keerut Sing* v. *Koolahul Sing* (1839), 2 M. I. A. 331; 5 W. R. P. C. 131; *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529; 2 W. R. P. C. 61; *Thakoor Deyhee* (*Mussumat*) v. *Baluk Ram* (*Rai*) (1866), 11 M. I. A. 139; 10 W. R. P. C. 5; 2 Ind. Jur. N. S. 106; *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487; 9 W. R. P. C. 23; *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 154; 5 Calc. 776, at pp. 789, 790; 6 C. L. R. 322, at pp. 332, 333; S. C. in Court below, *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at p. 5; 19 W. R. C. R. 367, at p. 368; *Panchcowree Mahtoon* v. *Kaleechurn* (1868), 9 W. R. C. R. 490; *Haridas Dutt* v. *Ranganmani Dasi* (1851), 2 Taylor and Bell, 279; "Vyavastha Darpana," 2nd ed., p. 124; *Gurunath Nilkanth* v. *Krishnaji Govind* (1880), 4 Bom. 462; *Jamiyatram* v. *Jamna* (*Bai*) (1864), 2 Bom. H. C. 10; *Lakshmibai* v. *Ganpat Moroba* (1867), 4 Bom. H. C. O. C. 150, at p. 163; *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (1869), 6 Bom. H. C. O. C. 1; *Karuppa Thevan* v. *Alayu Pillai* (1881), 4 Mad. 152; "Daya-Bhaga," chap. xi. s. i. para. 61; "Vyavahara Mayukha," chap. iv. s. viii. para. 4; "Viramitrodaya," chap. iii. part i. s. 3; "Smriti Chandrika," chap. xi. s. i. para. 28; "Vivada Chintamani" (P. C. Tagore's translation), p. 261; (widow of *sapinda* in Bombay) *Bharmangavda* v. *Rudrapgavda* (1879), 4 Bom. 181; *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662; *Madhavram Mugatram* v. *Dave Tramdaklal Bhawanishankar* (1896), 21 Bom. 739. This applies also to the widow of a Nambudhri Brahmin, *Vasudevan* v. *Secretary of State* (1887), 11 Mad. 157, at p. 165.

[5] *Chotay Lall* v. *Chunno Lall* (1878), 6 I. A. 15; 4 Calc. 744; 3 C. L. R. 465; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290; *Venkayamma Garu* (*Raja Chelikani*) v. *Venkataramanayamma* (*Raja Chelikani*) (1902), 29 I. A. 156; 25 Mad. 678; 7 C. W. N. 1; 4 Bom. L. R. 657; *Dowlut Kooer* v. *Burmadeo Sahoy* (1874), 14 B. L. R. 246, note; 22 W. R. C. R. 54; *Deo Persad* v. *Lujoo Roy* (1873), 14 B. L. R. 245, note; 20 W. R. C. R. 102; *Gyan Koowur* (*Mussumaut*) v. *Dookhurn Singh* (1829), 4 Ben. Sel. R. 330 (new edition, 420); *Sheo Sehai Singh* v. *Omed Konwur* (*Mussummat*) (1840), 6 Ben. Sel. R. 301 (new edition, 378); *Gunga Mya* v. *Kishen Kishore Chowdhry* (1821), 3 Ben. Sel. R. 128 (new edition, 170); *Kattama Nachiar* v. *Dorasingar Tevar* (1871), 6 Mad. H. C. 310.

[6] *Post*, pp. 467, 468.

[7] (Bombay cases) *Vrijbhukandas Dwarkadas* v. *Parvati* (*Bai*) (1907), 32 Bom. 2; 9 Bom. L. R. 1187; *Madhavram* v. *Dave Trambaklal* (1896), 21 Bom. 739, at p. 744; *Tuljaram Morarji*

and a grandmother [1] (except in Bombay [2]) take only a restricted estate.

She has no greater right over the self-acquired property of the last full owner than over the property inherited by him.[3]

The restriction applies to *inams*, even though they be enfranchised in the widow's name.[4]

Cannot alter estate.

A restricted female owner cannot alter the nature of the estate held by her. Thus a widow cannot, "by any act or declaration of her own, while retaining possession of her husband's estate, give her possession or estate a character different from that attaching to the possession or estate of a Hindu widow," [5] and daughters cannot by any arrangement alter the rights of the reversionary heirs.[6]

Even the whole body of immediate reversioners cannot enlarge the estate of a restricted female heir by a release or otherwise,[7] but reversioners giving such release for good consideration may be bound by it.[8]

The interest of the widow is not altered by a new settlement being made

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v. *Mathuradas* (1881), 5 Bom. 662, at p. 70; *Bharmangavda* v. *Rudrapgavda* (1879), 4 Bom. 181, at p. 187; *Sakharam Sadashiv Adhikari* v. *Sitabai* (1879), 3 Bom. 353; *Narsappa Lingappa* v. *Sakharam Krishna* (1869), 6 Bom. H. C. A. C. 215; *Vinayek Anundrao* v. *Luxumeebaee* (1861), 1 Bom. H. C. 117. (It is submitted that the reasons given in *Gandhi Maganlal Motichand* v. *Jadab (Bai)* (1897), 24 Bom. 192; 1 Bom. L. R. 574, for holding that a grandmother takes an absolute estate in Bombay might also be applied to a mother.) (Madras cases) *P. Bachiraju* v. *Venkatappadu* (1865), 2 Mad. H. C. 402; *Kutti Ammal* v. *Radakristna Aiyan* (1875), 8 Mad. H. C. 88. (Benares school) *Jullessur Kooer* v. *Uggur Roy* (1882), 9 Calc. 725; 12 C. L. R. 460; *Punchanund Ojhab* v. *Lalshan Misser* (1865), 3 W. R. C. R. 140. (Mithila school) *Ibid.*; "Vivada Chintamani" (P. C. Tagore's translation), p. 263. (Bengal school) *Poorendra Nath Sen* v. *Hemangini Dasi* (1908), 36 Calc. 75; 12 C. W. N. 1002; *Bijya Dibeh (Mussummaut)* v. *Unpoorna Dibeh (Mussummaut)* (1806), 1 Ben. Sel. R. 162 (new edition, 215); *Nufur Mitter* v. *Ram Koomar Chuttoorjya* (1828), 4 Ben. Sel. R. 310 (new edition, 393); *Hemlutta Debea* v. *Goluck Chunder Gosayn* (1842), 7 Ben. Sel. R. 108 (new edition, 127).

[1] *Phukar Singh* v. *Ranjit Singh* (1878), 1 All. 661.

[2] In Bombay a grandmother takes absolutely, *Gandhi Maganlal* v. *Jadab (Bai)* (1899), 24 Bom. 192; 1 Bom. L. R. 574, *post*, pp. 467, 468. See, however, *Madhavram Mugatram* v. *Dave Tramkaklal* (1896), 21 Bom. 739, at p. 744.

[3] *Namasivaya Chetti* v. *Sivagami* (1863), 1 Mad. H. C. 374.

[4] *Vangala Dikshatulu* v. *Vangala Gavaramma* (1904), 28 Mad. 13. See *ante*, p. 439.

[5] *Sham Lall Mitra* v *Amarendro Nath Bose* (1895), 23 Calc. 460, at p. 473.

[6] *Sengamalathammal* v. *Valaynda Mudali* (1867), 3 Mad. H. C. 312, at p. 317; *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (1897), 24 Calc. 339; *Gobind Krishna Narain* v. *Abdul Qayyum* (1903), 25 All. 546; *Kanni Ammal* v. *Ammakannu Ammal* (1899), 23 Mad. 504.

[7] *Narasimham* v. *Madhavaradugu*, 13 M. L. J. 323; *Hemchunder Sanyal* v. *Sarnamoyi Debi* (1894), 22 Calc. 354; *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (1906), 30 Mad. 201; *Hargawan Magan* v. *Baijnath Das* (1909), 32 All. 88; *contrà Kalichand Dutt* v. *Moore* (1837), 1 Fulton, 76; "Vyavastha Darpana," 2nd ed., p. 107. See *Olati Pulliah Chetti* v. *Varadarajulu Chetti* (1908), 31 Mad. 474; *post*, pp. 490, 491.

[8] *Kali Kishore Pal* v. *Abdul Karim* (1897), 2 C. W. N. 132. See *Ganpatrao Moroji* v. *Vamanrao Shamrao* (1908), 10 Bom. L. R. 210.

with her by the Government [1] unless it is quite clear from the terms of the settlement that it has been so altered.

Restrictions not dependent on heirs.

"The restrictions on a Hindu widow's power of alienation are inseparable from her estate, and . . . their existence does not depend on that of heirs capable of taking it on her death." [2]

The reason for a woman's interest being limited is that the property should not leave the *gotra* (family) of the person from whom she has inherited it.

Inherited property in Bombay.

In the Bombay Presidency, whether in places where the "Mitakshara" or in places where the "Mayukha" is paramount, property inherited by a woman from a male, or from a female, otherwise than as widow, mother, daughter-in-law, or widow of a *gotraja sapinda*, is, except so far as it may be subject to her husband's control during his lifetime,[3] her absolute and several property. She can deal with the property *inter vivos* or by will, and on her death it descends to the heirs of her *stridhan* property.[4]

This rule has been applied to a woman inheriting as daughter,[5] sister,[6] niece,[7] or grandniece.[8]

It was held by a Full Bench of the Bombay High Court in the case of *Gandhi Maganlal Motichand* v. *Jadab (Bai)* [9] that a paternal grandmother in Gujarat, inheriting movable and immovable property from her maiden

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[1] See *Kashi Prasad* v. *Inda Kunwar* (1908), 30 All. 490.

[2] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529, at p. 553; 2 W. R. P. C. 61, at p. 64.

[3] *Ante*, pp. 443, 444; *Bhau* v. *Raghunath Krishna Gurav* (1905), 30 Bom. 229; 7 Bom. L. R. 936.

[4] *Ante*, chap. xiv.

[5] *Gulappa Domingappa Kusugal* v. *Tayawa* (1907), 31 Bom. 453; 9 Bom. L. R. 834; *Rindabai* v. *Anacharya* (1890), 15 Bom. 206, at p. 208; *Jankibai* v. *Sundra* (1890), 14 Bom. 612; *Bhagirthibai* v. *Kahnujirav* (1886), 11 Bom. 285; *Haribhat* v. *Damodharbhat* (1878), 3 Bom. 171; *Bulakhidas* v. *Keshavlall* (1881), 6 Bom. 85; *Babaji* v. *Balaji Ganesh* (1881), 5 Bom. 660; *Bhau* v. *Raghunath Krishna Gurav* (1905), 30 Bom. 229, at pp. 236, 237; *Navalram Atmaram* v. *Nandkishor Shivnarayen* (1864), 1 Bom. H. C. 209; *Pranjeevandas Toolseydas* v. *Dewcooverbaee* (1859); *Ibid.*, 130; *Rukhmani (Bai)* v. *Keshavlal* (1907), 9 Bom. L. R. 1293; *Vithappa* v. *Savitri* (1910), 34 Bom. 510; 12 Bom. L. R. 487. See Acharya's "Law of Codification," pp. 345 *et seq.*

[6] *Rindabai* v *Anacharya* (1890), 15 Bom. 206; *Bharmangavda* v. *Rudrapgavda* (1879), 4 Bom. 181, at p. 187; *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (1869), 6 Bom. H. C. O. C. 1; *Vinayek Anundrao* v. *Luxumeebaee* (1861), 1 Bom. H. C. 117; S. C. on appeal (1864), 9 M. I. A. 520; 3 W. R. P. C. 41.

[7] *Madhavram* v. *Dave Trambaklal* (1896), 21 Bom. 739, at p. 744.

[8] *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662; *Madhavram* v. *Dave Trambaklal* (1896), 21 Bom. 739, at p. 744.

[9] (1899), 24 Bom. 192; 1 Bom. L. R. 574.

granddaughter, takes an absolute interest in such property,[1] and that on her death the property goes to her heir, and not to the heir of the granddaughter. Mr. Mayne considered [2] that this decision has been impliedly overruled by the decisions of the Judicial Committee in *Sheo Shankar Lal* v. *Debi Sahai*,[3] and *Sheo Pertab Bahadur Singh* (*Lal*) v. *Allahabad Bank*.[4] It is submitted, however, that this does not necessarily follow. The Bombay decision was founded on the peculiar law of that Presidency. Under that law a grandmother, as in other places governed by the Mitakshara system, succeeds *quâ* grandmother, and not *quâ* widow of the grandfather. She has not, therefore, the limited estate which the Bombay system of law gives to the widows of *gotraja sapindas*,[5] but under that law she is treated as if she were herself a *gotraja sapinda*, and therefore, although a woman, she is, by analogy to the cases of sisters and nieces, under that law entitled to an absolute estate. Similarly the Bombay rule as to the absolute character of the estate of a daughter has not been affected by the above decisions of the Judicial Committee.[6] The same reasoning would, it is submitted, apply to the case of a mother.

Where more than one of the same class take, they each take a several interest without rights of survivorship.[7]

It has been laid down that female heirs who have not become members of the family of the late owner by marriage take absolutely,[8] but there is authority that the question is one of *sapinda relationship*, not of marriage.[9]

In the Bombay Presidency female heirs as a general rule take absolutely. The cases of dependent widows, mothers, collateral *sapindas*, and daughters-in-law are an exception. Where a woman inherits to a male owner as a widow, or as a mother, or as the wife of a *gotraja sapinda*, she takes only a limited estate,[10] as in the case of the inheritance of women in other parts of India.

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[1] On the ground that a grandmother takes in her own right, and not as widow of the grandfather.

[2] "Hindu Law," 8th ed., pp. 854, 855.

[3] (1903), 30 I. A. 202; 25 All. 468; 7 C. W. N. 831; 5 Bom. L. R. 828.

[4] (1903), 30 I. A. 209; 25 All. 476; 7 C. W. N. 840; 5 Bom. L. R. 833.

[5] *Ante*, p. 467.

[6] See *Bhau* v. *Raghunath Krishna Gurav* (1905), 30 Bom. 229, at pp. 236, 237; 7 Bom. L. R. 936.

[7] *Vithappa* v. *Savitri* (1910), 34 Bom. 510; 12 Bom. L. R. 487; *Rukhmani* (*Bai*) v. *Keshavlal* (1907), 9 Bom. L. R. 1293.

[8] *Bhau* v. *Raghunath Krishna* (1905), 30 Bom. 229, at p. 237, approved of in *Vrijbhukandas* v. *Parvati* (*Bai*) (1907), 32 Bom. 26, at p. 29; 9 Bom. L. R. 1187; *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662, at p. 664; *Rindabai* v. *Anacharya* (1890), 15 Bom. 206; *Madhavram* v. *Dave Trambaklal* (1896), 21 Bom. 739; *Dhondi* v. *Radhabai* (1912), 36 Bom. 546; 14 Bom. L. R. 569.

[9] *Gandhi Maganlal* v. *Jadab* (*Bai*) (1899), 24 Bom. 192, at p. 213; 1 Bom. L. R. 574.

[10] See *Dhondi* v. *Radhabai* (1912), 36 Bom. 546; 14 Bom. L. R. 569; *Gadadhar Bhat* v. *Chandrabhagabai* (1892), 17 Bom. 690; *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662; *ante*, p. 465, note 4.

"The principle of dependence, which perhaps governs the extent of power, may regulate the exceptions where widowed females inherit from males, but in all other cases the rule of absolute dominion must be allowed to prevail." [1]

In the case of a deceased maiden daughter property inherited by her from her mother is said to pass (at any rate in Madras) by a special rule under which she becomes as much an absolute owner as her mother,[2] but there is authority to the contrary.[3] Maiden daughter.

The text of the "Mitakshara," [4] upon which this rule is said to be based, does not seem to give her greater rights than any other female heir to *stridhan* property.

"A sonless widow of a Saraogee-Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus: that is, she takes an absolute interest, at least in the self-acquired property of her husband. . . ." [5] Jains.

In the case of ancestral property, she takes only the interest which is taken by an orthodox Hindu widow.[6]

A widow or other limited heir has no greater power over the movable property inherited by her than she has over the immovable property according to the schools of Bengal [7] and Benares.[8] The Madras High Court has taken the same view as to the law prevalent in Southern India.[9] Movable property.

The law in Bombay on this subject is not so settled.

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[1] *Gandhi Maganlal Motichand* v. *Jadab* (*Bai*) (1899), 24 Bom. 192, at p. 214; 1 Bom. L. R. 574.

[2] See *Narasayya* v. *Venkayya*, 2 Mad. L. J. 149, explained in *Venkataramakrishna Rau* v. *Bhujanga Rau* (1895), 19 Mad. 107, at p. 109; *Gandhi Maganlal Motichand* v. *Jadab* (*Bai*) (1899), 24 Bom. 192; 1 Bom. L. R. 574.

[3] *Janakisetty Sooryudu* v. *Miryala Hanumayya* (1909), 32 Mad. 521; see *Virasangappa Shetti* v. *Rudrappa Shetti* (1895), 19 Mad. 110.

[4] Chap. ii. s. xi. para. 30.

[5] *Sheo Singh Rai* v. *Dakho* (*Mussumat*) (1874), 6 N. W. P. 382, at p. 411, approved on appeal (1878), 5 I. A. 87, at p. 110; 1 All. 688, at p. 704; *Shimbhu Nath* v. *Gayan Chand* (1894), 16 All. 379; *Harnabh Pershad* v. *Mandil Dass* (1899), 27 Calc. 379.

[6] *Shimbhu Nath* v. *Gayan Chand* (1894), 16 All. 379.

[7] *Durga Nath Pramanik* v. *Chintamoni Dasi* (1903), 31 Calc. 214; 8 C. W. N. 11; *Kashinath Basak* v. *Harasundari Dasi* (1826), "Vyavastha Darpana," 2nd ed., 97; Clarke's "Rules and Orders," p. 91; S. C. in Court below, *Cossinaut Bysack* v. *Hurroosoondry Dossee* (1819), 2 Morley's "Digest," 198; *Thakoor Deyhee* (*Mussumat*) v. *Baluk Ram* (*Rai*) (1866), 11 M. I. A. 139, at p. 175; 10 W. R. P. C. 3, at p. 9.

[8] *Bhugwandeen Doobey* v. *Myna Baee* (1867), 11 M. I. A. 487; 9 W. R. P. C. 23.

[9] *Narasimha* v. *Venkatadhri* (1885), 8 Mad. 290; *Buchi Ramayya* v. *Jagapathi* (1884), 8 Mad. 304. There were decisions in the Madras Sudder Court to a contrary effect, see Norton's L. C. pp. 648, 652.

It is clear that in those districts of the Bombay Presidency where the "Mitakshara" is supreme,[1] she has no greater power than in Bengal or Benares.[2] It is also clear that even in territories governed by the "Mayukha" a widow has no testamentary power of disposition over movables which have been inherited by her from her husband,[3] and that on her death they do not pass to her heirs, and are not available in their hands for the payment of her debts.[4] She may exercise a power given to her by the will of her husband.[5] "Even in the 'Mayukha' there is not a text which distinctly and definitely supports the widow's absolute dominion and power over movables inherited from her husband."[6] There is, however, considerable judicial authority that in cases governed by the "Mayukha" a widow or other female owner can dispose of the movable property during her lifetime.[7]

"It is observed by Mr. Mayne, in s. 229, that the power must generally be taken to be limited to such necessary or suitable purposes as would come within the ordinary power of the head of a household. We should prefer to say that the nature of movable property being such that in many cases conversion is essential to its enjoyment, the widow is not precluded from converting it, but must preserve the capital, unless the expenditure of it is necessitated by the insufficiency of the income to provide for her maintenance, subject, nevertheless, to a power to dispose of a moderate portion for works of piety."[8]

Under the Mithila law a childless Hindu widow, although she cannot alienate the immovable property, has an absolute right over the movable property inherited from her husband, and can alienate it in any manner she pleases.[9]

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[1] *Ante*, p. 19.

[2] *Pandharinath Vishvanath* v. *Govind Shivram* (1907), 32 Bom. 59; 9 Bom. L. R. 305. See *Gadadhar Bhat* v. *Chandrabhagabai* (1892), 17 Bom. 690.

[3] *Chamanlal Maganlal Sha* v. *Doshi Ganesh Motichand* (1904), 28 Bom. 453; 6 Bom. L. R. 460, following *Gadadhar Bhat* v. *Chandrabhagabai* (1892), 17 Bom. 690. See *Harilal Harjivandas* v. *Pranvalavdas Parbhudas* (1888), 16 Bom. 229; *Motilal Lalubhai* v. *Ratilal Mahiputram* (1895), 21 Bom. 170.

[4] *Jamna* (*Bai*) v. *Bhaishankar* (1891), 16 Bom. 233.

[5] *Motilal Lalubhai* v. *Ratilal Mahiputram* (1895), 21 Bom. 170.

[6] *Pandharinath* v. *Govind* (1907), 32 Bom. 59, at p. 73; 9 Bom. L. R. 1305.

[7] *Bechur Bhugwan* v. *Lukmee* (*Baee*) (1863), 1 Bom. H. C. 56; *Vinayek Anundrao* v. *Luxumeebace* (1861), 1 Bom. H. C. 117; *Pranjeevandas* v. *Dewcooverbaee* (1859), 1 Bom. H. C. 130; *Laksmibai* v. *Ganpat Moroba* (1867), 4 Bom. H. C. O. C. 150, at p. 162. In *Bhagirthibai* v. *Kahnujirav* (1886), 11 Bom. 285, at p. 297, West, J., says that the widow's absolute right to movable property inherited from her husband has never been seriously questioned in Bombay. See also *Balvantrav* v. *Purshotam* (1872), 9 Bom. H. C. 99, at p. 111; *Tuljaram Morarji* v. *Mathuradas* (1881), 5 Bom. 662, at p. 670; *Damodar Madhowji* v. *Purmanandas* (1883), 7 Bom. 155, at p. 163.

[8] *Narasimha* v. *Venkatadri* (1885), 8 Mad. 290, at p. 293, referred to in *Gadadhar Bhat* v. *Chandrabhagabai* (1892), 17 Bom. 690, at pp. 703, 704.

[9] *Birajun Koer* v. *Luchmi Narain Mahata* (1884), 10 Calc. 392; *Doorga Dayee* v. *Poorun Dayee* (1886), 5

Even where a woman has power to dispose of property inherited by her by an act *inter vivos*, she cannot dispose of it by will,[1] and if it has not been disposed of, it passes to the next heir.[2]

Will.

As to the interest taken by a mother or grandmother in property allotted to her on partition, see *ante*, pp. 335, 336.

Share on partition.

The whole estate is vested in the widow or other restricted female owner.[3] She completely represents it.[4] She is entitled to the absolute possession of it,[5] and the full enjoyment of its produce, which she can spend without being accountable to any one.[6] She cannot waste the corpus of the property, nor can she alienate it beyond her lifetime,[7] except for purposes of necessity or with the assent of the next reversioners, *i.e.* of the persons who are at the time of the alienation heirs of the last full owner.[8] All acts for the benefit of the estate or for necessity bind the estate.[9]

Nature of estate of widow or other limited female heir.

During her lifetime no one else has any interest in the estate.[10]

" It is clear that under the Hindu law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance it is an anomalous estate. It

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W. R. C. R. 141 ; *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 36) ; " Vivada Chintamani " (Tagore's translation), pp. 261, 262.

1 For instance she cannot by will create a charge on her husband's immovable property for the purpose of paying debts incurred for necessary purposes ; *Vishvanath* v. *Narayan* (1903), 5 Bom. L. R. 314.

2 *Thakoor Deyhee* (*Mussumat*) v. *Baluk Ram* (*Rai*) (1886), 11 M. I. A. 139 ; 10 W. R. P. C. 3 ; *Gadadhar Bhat* v. *Chandrabhagabai* (1892), 17 Bom. 690 ; *Harilal Harjivandas* v. *Pranvalavdas Parbhudas* (1888), 16 Bom. 229. See " Vivada Chintamani," pp. 261, 262.

3 *Janaki Ammal* v. *Narayanasami Aiyer* (1916), 43 I. A. 207 ; 39 Mad. 634 ; 20 C. W. N. 1323 ; 18 Bom. L. R. 856 ; *Anandibai* v. *Rajaram Chintaman Pethe* (1897), 22 Bom. 984 ; *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866), 3 Mad. H. C. 116.

4 *Kery Kolitany* v. *Moneeram Kolita* (1873), 13 B. L. R. 1, at p. 53 ; 19 W. R. C. R. 367, at p. 396 ; *Bhala Nahana* v. *Parbhu Hari* (1877), 2 Bom. 67, at pp. 73, 74, and cases therein cited ; *Karimuddin* (*Munshi*) v. *Gobind Krishna Narain* (*Kunwar*) (1909), 36 I. A. 138 ; 31 All. 497 ; 13 C. W. N. 1117 ; 11 Bom. L. R. 911.

5 *Kashinath Basak* v. *Harasundari Dasi* (1826), Clarke's " Rules and Orders ; " Montriou's " Cases of Hindu Law," p. 495 ; " Vyavastha Darpana," 2nd ed., p. 97 ; *Biswanath Chandra* v. *Khantomani Dasi* (1871), 6 B. L. R. 747.

6 *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866), 3 Mad. H. C. 116 ; *In the goods of Harendranarayan* (1853), 4 B. L. R. O. C. 41, note.

7 *Post*, p. 477.

8 *Post*, pp. 486, 487.

9 *Sadasi Koer* v. *Ramgobind Singh* (1911), 15 C. W. N. 857.

10 *Post*, p. 499.

is a qualified proprietorship, and it is only by the principles of Hindu law that the extent and nature of the estate can be determined." [1]

"A widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship . . . does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to her and the heirs of her husband." [2]

But the estate of a Hindu widow is very different from a mere life estate. "The case of *Kashinath Basak* v. *Harasundari Dasi* [3] . . . establishes that the estate of the widow is something higher than a life estate, that it entitles her to the possession of the property without restriction; and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible, to define further than by saying that the propriety of any particular exercise of that power must depend on the circumstances in which it is made, and must be consistent with the general principles of Hindu law regarding such dispositions. The cases of *Oojulmonee Dossee* v. *Sagormonee Dossee* and *Hurry Doss Datt* v. *Runjunmonee Dossee*,[4] which have established in this Court the right of the reversionary heirs, though their interest is only contingent, to maintain a suit to restrain waste by the widow [5] (particularly the latter case in which the late Chief Justice entered at large into the nature of the widow's estate) are quite consistent with what I have above stated. Sir Lawrence Peel there says: 'The estate, though sometimes so expressed to be, is not an estate for life; when a widow alienates she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a life estate.'" [6]

Different from manager.

Her position is different from that of a manager. "A manager stands in a different position. He can act only with the assent, express or implied, of the body of coparceners.[7] In the widow's case the coparceners are reduced to herself, and the estate centres in her." [8]

Acknowledgment.

As a reversioner does not derive title through the restricted heir, an acknowledgment of a right or liability by her does not under the existing limitation law [9] bind the reversioner.[10]

[1] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529, at p. 550; 2 W. R. P. C. 61, at p. 64.

[2] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 154; 5 Calc. 776, at pp. 789, 790; 6 C. L. R. 322, at pp. 332, 333. See *Bhala Nahana* v. *Parbhu Hari* (1877), 2 Bom. 67, at pp. 73, 74, and cases there cited; *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543; 2 W. R. P. C. 31.

[3] (1826), Clarke 91; Montriou's "Cases of Hindu Law," p. 495; "Vyavastha Darpana," 2nd ed., p. 97.

[4] (1851), 2 Taylor and Bell, p. 279; "Vyavastha Darpana," 2nd ed., p. 125; Sev. 657.

[5] See *post*, pp. 501, 502.

[6] *Jadomoney Dabee* v. *Sarada Prosanno Mookerjea* (1856), 1 Boul. 120, at p. 129.

[7] See *ante*, p. 274.

[8] *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1886), 11 Bom. 320, at p. 324.

[9] Act IX. of 1908, s. 19.

[10] *Shib Shankar Lal* v. *Soni Ram* (1909), 32 All. 33; affirmed on appeal, *Soni Ram* v. *Kanhaiya Lal* (1913), 35 All. 227; 17 C. W. N. 605; 15 Bom. L. R. 489.

Interference with her acts.

The Court will not interfere with the action of the limited female owner, unless it is shown that there is danger from the mode in which she is dealing with the property, or that her acts have endangered the estate or the reversion.[1]

"A bill filed by the presumptive heir in succession against the immediate owner who has succeeded by inheritance, must show a case approaching to spoliation, must enable the Court to see that there is probable ground for apprehending that, unless an injunction be granted to restrain some threatened or impending act, ultimate loss to the heirs who may come into possession by succession will ensue. It is not enough to make out that some gift has been made or some disposition taken place, or that such is about to be made or to take place, which the law would not support. The estate of the female owner, her own personal estate, might be large, and adequate to repay ten times over the alleged spoliation, and there might not be the remotest prospect of loss, and the thing alienated might have no specific peculiar value." [2]

The mere fact of the widow keeping in hand for about three months part of the corpus for the alleged purpose of an eligible investment does not amount to waste, nor is it in derogation of the rights of those entitled to reversion.[3]

If there be an apprehension of waste of movable property allotted to a widow on partition, provision may be made in the final decree to safeguard the interests of the reversioners.[4] In one case the Bombay High Court [5] required a sum of money to which a widow was entitled as such to be secured for the benefit of the reversion, but in another case the Calcutta High Court held that she cannot be compelled, without proof of waste, to give security for the value received by her of lands belonging to her husband's estate taken by a railway company.[6] The Court may now direct the investment of the proceeds of land belonging to a restricted heir which has been acquired for public purposes.[7]

"The principle that a Hindu widow is entitled to the uncontrolled possession of property, movable and immovable, of her deceased husband, is clearly laid down by Lord Gifford in *Cossinath Bysack* v. *Hurrosoondry Dossee*.[8] . . . The general apprehension of danger that, if personal property be entrusted to a Hindu widow, there is every probability of its being parted with, and if so, it may not be recovered, is an element which cannot

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[1] *Hurrydoss Dutt* v. *Uppoornah Dossee* (1856), 6 M. I. A. 433. See *post*, pp. 501, 502.

[2] *Haridas Dutt* v. *Ranganmani Dasi* (1851), 2 Taylor and Bell, 279; "Vyavastha Darpana," 2nd ed., 127; Sev. 657. See *Hurrydoss Dutt* v. *Uppoornah Dossee* (1856), 6 M. I. A. 433.

[3] *Hurrydoss Dutt* v. *Uppoornah Dossee* (*Sreemutty*) (1856), 6 M. I. A. 433.

[4] *Durga Nath Pramanik* v. *Chintamoni Dassi* (1903), 31 Calc. 214; 8 C. W. N. 11.

[5] *Gambhirmal* v. *Hamirmal* (1896), 21 Bom. 747.

[6] *Bindoo Bassinee Dossee* v. *Bolie Chand Sett* (1864), 1 W. R. C. R. 125.

[7] Land Acquisition Act (I. of 1894), s. 32; see *Mrinalini Dasi* v. *Abinash Chandra Dutt* (1910), 14 C. W. N. 1024.

[8] (1826), Clarke's "Rules and Orders," App. 91; Montriou's "Cases of Hindu Law," p. 495; "Vyavastha Darpana," 2nd ed., p. 97

be allowed to exist or considered consistently with the views of the Privy Council in the case last cited. The danger must be established not as a matter of probable speculation, but as one of reasonable certainty to the satisfaction of the Court."[1]

Where more than one widow.

There is authority that where there is more than one widow the elder widow has the preferable claim to the management of the property.[2]

Two or more widows may by an agreement *inter se*, not prejudicial to the rights of the next heir in succession, provide for the distributive enjoyment of the benefit of the joint property by an apportionment thereof.[3]

Additions to estate.

Where additions are made to an estate by a restricted female owner with the intention that they should form part of the estate, such additions pass with the estate and not to the heirs of such owner, though they have been made with funds over which she has absolute powers of disposal.

Such intention will be presumed in the case of the erection of buildings on land belonging to the estate.[4]

Accumulations.

A widow or other restricted female owner may use for her own purposes and may alienate the income of the estate which has accumulated in her hands, or which has accumulated in the hands of some other person from whom she recovers it.[5]

"The true test to be applied to cases of this description is to determine from the surrounding circumstances the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband, or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes?"[6]

Should there be no proof of any distinct intention to appropriate to herself investments made from income or accumulations of income, they will be considered accretions to the estate.[7]

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[1] Per Paul, J., in *Biswanath Chandra* v. *Khantomani Dasi* (1871), 6 B. L. R. 747, at p. 751.

[2] *Jijoyiamba Bayi Saiba* (*H. H. M.*) v. *Kamakshi Bayi Saiba* (*H. H. M.*) (1868), 3 Mad. H. C. 424.

[3] *Ibid.* at p. 453; *Mahadevappa* v. *Basagawda* (1905), 29 Bom. 346; 7 Bom. L. R. 238.

[4] *Venkata Narasimha Appa Rao Bahadur* (*Rajah*) v. *Venkata Purushothama Jagannadha Gopala Row Bahadur* (*Rajah Surenani*) (1908), 31 Mad. 321; *Fakira Dobey* v. *Gopi Lal* (1880), 6 C. L. R. 66.

[5] *Soorjeemoney Dossee* (*Sreemutty*) v. *Denobundoo Mullick* (1862), 9 M. I. A. 123; *Pannalal Seal* v. *Bamasundari Dasi* (1871), 6 B. L. R. 732; *Soudaminee Dossee* v. *Administrator General of Bengal* (1892), 20 I. A. 12; 20 Calc. 433; *Isri Dut Koer* v. *Hansbutti Koerain* (*Mussumut*) (1883), 10 I. A. 150, at p. 158; 10 Calc. 324, at p. 334; 13 C. L. R. 418, at p. 424; *Saminatha Pillai* v. *Manikkasami Pillai* (1899), 22 Mad. 356. See, however, *Grose* v. *Amirtamayi Dasi* (1869), 4 B. L. R. O. C. 1, at pp. 40, 42; 12 W. R. O. C. J. 13, at pp. 28, 29.

[6] *Bhagabati Koer* v. *Sahudra Koer* (1911), 16 C. W. N. 834, at pp. 836, 837.

[7] *Sheo Lochun Singh* (*Babu*) v. *Saheb Singh* (*Babu*) (1887), 14 I. A. 63; 14 Calc. 387; *Gonda Koer* v. *Oodey Singh* (*Kooer*) (1874), 14 B. L. R.

When a widow purchases property with money borrowed on the credit of her husband's estate, his heir is entitled to it, subject to the burden of paying the debt.[1] Where she uses accumulations for purchasing property which had belonged to her husband, it may be inferred that she intended to treat it as part of her husband's estate.[2]

If she invest the income with the intention that it should be an accretion to her husband's estate, she cannot thereafter deal with it, except under circumstances which would justify her dealing with the original estate.[3]

Should she invest the income in such a way as to indicate her intention that it was not to form part of her husband's estate, but to remain at her disposal, whether such investment be of a temporary or permanent nature, she can deal with it, at any rate, during her lifetime.[4] Should she not dispose of the property during her lifetime it does not pass to her heir, but is treated as a portion of her husband's estate.[5]

It is not "possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it." [6]

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159. See, however, *Akkanna* v. *Venkayya* (1901), 25 Mad. 351, at pp. 359, 360.

[1] *Oodey Singh* (*Kooer*) v. *Phool Chund* (1873), 5 N. W. P. 197.

[2] *Bhagabati Koer* v. *Sahudra Koer* (1911), 16 C. W. N. 834.

[3] *Isri Dut Koer* v. *Hansbutti Koerain* (*Mussumut*) (1883), 10 I. A. 150, at p. 161; 10 Calc. 324, at p. 337; 13 C. L. R. 418, at p. 427.

[4] See *Sowdaminee Dossee* v. *Administrator General of Bengal* (1892), 20 I. A. 12; 20 Calc. 433; *Akkanna* v. *Venkayya* (1901), 25 Mad. 351; *Puddo Monee Dossee* (*Sreemutty*) v. *Dwarka Nath Biswas* (1876), 25 W. R. 335, at p. 340; *Nihal Khan* v. *Hur Churn Lall* (1866), 1 Agra, 219.

[5] *Wahid Ali Khan* v. *Tori Ram* (1913), 35 All. 551, at p. 555; *Kula Chandra Chakravarti* v. *Bama Sundari Dasee* (1914), 41 Calc. 870; *Anund Chundra Mundul* v. *Nilmoney Jourdar* (1883), 9 Calc. 758; *Isri Dut Koer* v. *Hansbutti Koerain* (*Mussumut*) (1883), 10 I. A. 150, at p. 158; 10 Calc. 324, at p. 334; 13 C. L. R. 418, at p. 429; S. C. in Court below, *Hunsbutti Kerain* v. *Ishri Dutt Koer* (1879), 5 Calc. 512, at p. 521; 4 C. L. R. 511, at pp. 519, 520; *Sridhar Chattopadhya* v. *Kalipada Chuckerbutty* (1911), 16 C. W. N. 106, where it was held that an agent appointed by a Hindu widow is bound to account to the reversioner for profits realized by him in the widow's lifetime and not paid to her. See *Bhagbutti Daee* (*Mussumat*) v. *Bholanath Thakoor* (*Chowdhry*) (1875), 2 I. A. 256, at pp. 260, 261; 24 W. R. C. R. 168, at pp. 169, 170; S. C. in Court below, *Bholanath Thakoor* (*Chowdhry*) v. *Bhagabutti Deyi* (*Musst*) (1871), 7 B. L. R. 93, at p. 100; 15 W. R. C. R. 63, at p. 64, relying on *Chundrabulee Debia* v. *Brody* (1868), 9 W. R. C. R. 584, and *Nihal Khan* v. *Hur Churn Lall* (1866), 1 Agra, 219; *Oodey Singh* (*Kooer*) v. *Phool Chund* (1873), 5 N. W. P. 197, at p. 201.

[6] *Isri Dut Koer* v. *Hansbutti Koerain* (*Mussumut*) (1883), 10 I. A. 150, at pp. 160, 161; 10 Calc. 324, at p. 337; 13 C. L. R. 418, at p. 427.

Income not appropriated by the restricted owner at the time of her death passes to the reversioner and not to her *stridhan* heir.[1]

Where under a deed or will a Hindu widow is given complete power to appropriate the profits, the profits unappropriated at the time of her death will apparently pass to her heir.[2]

Savings from maintenance money.

Where the widow is not owner of her husband's estate but invests money received therefrom on account of her maintenance, it is her *stridhan*,[3] and passes as such to her heirs.[4]

Presumption.

There is no presumption of law that property acquired by a Hindu widow after her husband's death forms part of his estate.[5]

Leases.

A restricted female owner can grant leases or do other acts in the ordinary course of management.[6]

Leases in excess of such power, such as permanent leases,[7] or leases for a long term of years,[8] are voidable by the reversioners at her death, unless they are justified by such circumstances as justify an alienation,[9] or perhaps in exceptional cases where they are justified by rules of prudent management,[10] or are for the benefit of the estate.[11]

The lease would at least enure for the life of the restricted owner.[12]

A suit to set aside such lease must be brought within twelve years from the restricted owner's death.[13]

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[1] *Rivett Carnac* v. *Jivibai* (1886), 10 Bom. 478; *Bhagabati Koer* v. *Sahudra Koer* (1911), 16 C. W. N. 834. See *Hunsbutti Kerain* v. *Ishri Dutt Koer* (1879), 5 Calc. 512, at p. 525; 4 C. L. R. 511, at p. 523.

[2] *Guru Prasad Roy* v. *Nafar Das Roy* (1869), 3 B. L. R. A. C. 121; 11 W. R. C. R. 497.

[3] *Ante*, p. 438.

[4] *Subramanian Chetti* v. *Arunachelam Chetti* (1904), 28 Mad. 1; *ante*, chap. xiv.

[5] *Ran Bijai Bahadur Singh* (*Diwan*) v. *Indar Pal Singh* (1899), 26 I. A. 226; 26 Calc. 871; 4 C. W. N. 1; 2 Bom. L. R. 1; *Dakhina Kali Debi* v. *Jagadishwar Bhuttacharjee* (1897), 2 C. W. N. 197. See *Bissessur Chuckerbutty* v. *Ramjoy Mojoomdar* (1865), 2 W. R. C. R. 326; 8 Sev. 708; *Gobind Chunder Mojoomdar* v. *Dulmeer Khan* (1874), 23 W. R. C. R. 125.

[6] *Ante*, p. 471.

[7] *Modhu Sudan Singh* (*Raja*) v. *Rooke* (1897), 24 I. A. 164; 25 Calc. 1; 1 C. W. N. 433. Cf. *Palaniappa Chetty* v. *Deivasikamony Pandara* (1917), 44 I. A. 147; 21 C. W. N. 729.

[8] *Sadai Naik* v. *Serai Naik* (1901), 28 Calc. 532; 5 C. W. N. 279; *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji* (1903), 30 Calc. 990; 7 C. W. N. 864; S. C. on appeal, *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (*Srimati*) (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R. 602. Cf. *Banee Madhub Ghose* v. *Thakoor Doss Mundul* (1866), B. L. R. F. B. R. 588; 6 W. R. Act X. R. 71.

[9] *Post*, pp. 477 *et seq.*

[10] See *Sankar Nath Mukerji* v. *Bejoy Gopal Mukerji* (1908), 13 C. W. N. 201.

[11] *Dayamani Debi* v. *Srinibash Kundu* (1906), 33 Calc. 842.

[12] *Mohunkoowur* (*Mussamut*) v. *Zoramun Singh* (*Baboo*) (1862), Marsh, 166; 1 Hay, 272; *Raie Churn Paul* v. *Suroop Chunder Mytee* (1868), 9 W. R. C. R. 598. See *post*, p. 477.

[13] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (*Srimati*) (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R. 602; *post*, pp. 477 *et seq.*

As to borrowing money for constructing a house, see *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya* (1912), 35 Mad. 560. See *post*, p. 483.

A Hindu widow can work a quarry and apply the proceeds for her own purpose, at any rate, provided that she does not exhaust the land.[1]

Quarry or mine.

A widow [2] or other restricted female owner [3] can alienate the property or her interest in it, if she be a joint owner,[4] for her lifetime, and the transferee acquires all her rights.[5] When she purports to alienate the whole estate in the property, but on the ground of want of necessity or otherwise her act is not binding on the reversioners, the alienation will enure until her death,[6] or if she has inherited the property as widow, until her remarriage.[7]

Alienation by restricted owner for her life.

This applies even when the widow holds under an arrangement which prevents her alienating, without expressly prohibiting her from alienating the estate for her life.[8]

A compromise may or may not amount to an alienation. Whether it does so depends upon the circumstances.[9]

As to partition between co-widows, see *ante*, pp. 327, 328.

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[1] *Subba Reddi* v. *Chengalamma* (1898), 22 Mad. 126.

[2] *Ramakkal* v. *Ramasami Naickan* (1899), 22 Mad. 522; *Hanuman Prosad Singh* v. *Bhagauti Prasad* (1897), 19 All. 357; *Durga Kunwar* v. *Matu Mal* (1913), 35 All. 311.

[3] *Kanni Ammal* v. *Ammakannu Ammal* (1899), 23 Mad. 504.

[4] *Janokinath Mukhopadhya* v. *Mothuranath Mukhopadhya* (1883), 9 Calc. 580; 12 C. L. R. 15; *Hari Narayan Jog* v. *Vitai* (1907), 31 Bom. 560; 9 Bom. L. R. 1049. This alienation will not prevent the right of survivorship of a widow or sister, *ibid.*, *Kanni Ammal* v. *Ammakannu Ammal* (1899), 23 Mad. 504.

[5] *Durga Kunwar* v. *Matu Mal* (1913), 35 All. 311.

[6] *Chedambaramma* v. *Hussainamma* (1915), 39 Mad. 565; *Vadali Mamidigadu* v. *Kotipalli Ramayya* (1902), 26 Mad. 334; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143; *Bhagavatamma* v. *Pampanna Gaud* (1865), 2 Mad. H. C. 393; *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866), 3 Mad. H. C. 116; *Munnalal Chaodri* v. *Gajraj Singh* (1889), 17 Calc. 246; *Gobindmani Dasi* v. *Shamlal Bysak* (1864), B. L. R. F. B. R. 48; W. R. F. B. R. 165; *Tarinee Churn Banerjee* v. *Nund Coomar Banerjee* (1864), 1 W. R. C. R. 47; *Ram Gutty Kurmokar* v. *Boishtub Churn Mojoomdar* (1867), 7 W. R. C. R. 167; *Radha* (*Mussamut*) v. *Kour* (*Mussamut*), W. R. 1864, C. R. 148; *Ramchandra Mankeshwar* v. *Bhimrav Ravji* (1877), 1 Bom. 577; *Melgirappa* v. *Shivappa* (1869), 6 Bom. H. C. A. C. 270; *Mayaram Bhairam* v. *Motiram Govindram* (1865), 2 Bom. H. C. 331 (2nd ed., 313); *Prag Das* v. *Hari Kishn* (1877), 1 All. 503; *Loll Soonder Doss* v. *Hurry Kishen Doss* (1862), Marsh, 113; 1 Ind. Jur. O. S. 32; 1 Hay, 33; *Haradhun Naug* v. *Issur Chunder Bose* (1866), 6 W. R. C. R. 222. Cf. cases, *ante*, p. 199, note 7.

[7] See *Haribhai* v. *Uka* (1899), 1 Bom. L. R. 201.

[8] *Sahodra* (*Mussummat Bebea*) v. *Jung Bahadoor* (*Roy*) (1881), 8 I. A. 210; 8 Calc. 224.

[9] See *Kambinayani Timnaji* v. *Kambinayani Subbaraju* (1910), 33 Mad. 473; *post*, p. 495.

Execution of decree.

The personal interest of the restricted owner may be sold in execution of a decree.[1]

Where the interest of a widow was sold, her heirs were held to be entitled to the proceeds.[2]

When widow, etc., can alienate.

For purposes of legal necessity,[3] caused by circumstances over which she had no control,[4] a widow or other woman with a restricted estate can alienate or charge[5] the property so as to bind the reversion. Where the income is sufficient to meet the necessity, the reversioners are not bound.[6]

She cannot do so by will.[7]

When she does not purport to bind the estate, the fact that there was necessity does not enlarge the operation of the transfer.[8]

Whether she intended by the transaction to bind the estate or merely to deal with her own interest depends upon the terms of the document.[9]

As to the principles upon which such deed is to be construed see *Vasonji Morarji* v. *Chanda Bibi* (1915), 37 All. 369; 19 C. W. N. 873; 17 Bom. L. R. 556; following *Hunooman Pershad Panday* v. *Munraj Koonweree* (1856), 6 M. I. A. 393, at pp. 411, 412.

Duty of purchaser or mortgagee and burden of proof.

The principles laid down in the leading case of *Hunooman Persaud Panday* v. *Munraj Koonweree* (*Mussumat Babooee*),[10] and the cases following it, as to what amounts to necessity, what is the duty of a person dealing with the manager for an

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[1] Act V. of 1908, s. 60; *Kanni Ammal* v *Ammakannu Ammal* (1899), 23 Mad. 504.

[2] *Chooney Money Dassee* v. *Ram Kinkur Dutt* (1900), 28 Calc. 155; 5 C. W. N. 242.

[3] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529, at p. 551; 2 W. R. P. C. 61, at p. 64; *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209; 3 B. L. R. P. C. 57; 12 W. R. P. C. 47; *Kurun Sing* (*Rao*) v. *Mahomed Fyz Ali Khan* (1871), 14 M. I. A. 187; 10 B. L. R. 1; *Jagannath Vithal* v. *Apaji Vishnu* (1868), 5 Bom. H. C. A. C. 217, at p. 221; *Panchcowree Mahtoon* v. *Kalee Churn* (1868), 9 W. R. C. R. 490; *Bulwunt Narain Singh* v. *Ram Kishen Singh*, W. R. 1864, C. R. 102.

[4] *Hafzoonnissa Begum* v. *Radhabinode Misser*, Ben. S. D. A., 1856, p. 595, at p. 605.

[5] This would include a permanent or long lease: see *Felaram Roy* v. *Bagalanand Banerjee* (1910), 14 C. W. N. 895, *ante*, p. 476.

[6] *Ravaneshwar Prasad Singh* v. *Chandi Prasad Singh* (1911), 38 Calc. 721; upheld on appeal (1915), 43 Calc. 417. See *Kaleenarain Roy Chowdhry* v. *Ram Coomar Chand*, W. R. 1864, C. R. 14.

[7] *Ante*, p. 471.

[8] *Prosunno Kumar Nandi* v. *Umedur Raja Chowdhry* (1908), 13 C. W. N. 353.

[9] See *Damodar* v. *Jankibai* (1903), 5 Bom. L. R. 350. The mere fact that the woman purports to mortgage "her right and interest" does not show that she intended only to transfer her life estate: *Narainbati* v. *Ramdhari Singh* (1916), 20 C. W. N. 734.

[10] (1856) 6 M. I. A. 393; 18 W. R. C. R., note to p. 81.

infant heir, and the burden of proof where an alienation by such manager is in question,[1] apply equally to the cases of persons dealing with Hindu widows or other restricted female owners.[2]

Circumstances of pressure.

She cannot raise the money until the necessity has actually arisen.[3] There must be a clear necessity for raising it, and an actual pressure.[4]

In *Upendranath Bose* v. *Bindesri Prosad* (1915), 20 C. W. N. 210, there are expressions which would extend the power of alienation beyond the case of pressing necessity, but in that case the alienation was binding as being in settlement of a *bonâ fide* dispute, and as being assented to by the reversioner.

The "necessity" involves some notion of pressure from without and not merely a desire to better or to develop the estate.[5] It involves generally circumstances of pressure which render the raising of money necessary for the protection or preservation of the estate.

Where there is no legal necessity, although the payment be for the benefit of the estate, as where a co-sharer paid the widow's share of the Government revenue, an alienation cannot be supported.[6]

An alienation cannot be supported by debts which have been paid by the widow during her husband's lifetime.[7]

A family settlement, whereby a Hindu widow gave up a portion of the property, was held not to bind the reversioners, who were then born, and not parties thereto.[8]

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[1] *Ante*, pp. 288–297.

[2] *Kameswar Pershad (Baboo)* v. *Run Bahadoor Singh* (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; *Amarnath Sah (Lala)* v. *Achan Kuar (Rani)* (1892), 19 I. A. 196; 14 All. 420; *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 766; *Cavaly Vencata Narrainapah* v. *Collector of Masulipatam* (1867), 11 M. I. A. 619; 10 W. R. P. C. 47; *Birj Lal (Lala)* v. *Inda Kunwar (Musammat)* (1914), 36 All. 187; 18 C. W. N. 652; 16 Bom. L. R. 352.

[3] *Mullakal* v. *Mada Chetty*, 6 Mad. Jur. 261, referred to in Mayne's "Hindu Law," 8th ed., p. 882.

[4] *Dharam Chand Lal* v. *Bhawani Misrain* (1897), 24 I. A. 183; 25 Calc. 189; 1 C. W. N. 697; *Byjnath Pershad (Lalla)* v. *Bissen Beharee Sahoy Singh* (1873), 19 W. R. C. R. 79.

[5] *Ganap* v. *Subbi* (1908), 32 Bom. 577; 10 Bom. L. R. 927. See *Himmat Bahadur* v. *Bhawani Kunwar* (1908), 30 All. 352; affirmed on appeal, *Bhawani Kunwar* v. *Himmat Bahadur* (1911), 33 All. 342; 15 C. W. N. 466; 13 Bom. L. R. 384.

[6] *Upendra Lal Mukerjee* v. *Girindra Nath Mukherjee* (1898), 25 Calc. 565; 2 C. W. N. 425.

[7] *Himmat Bahadur* v. *Bhawani Kunwar* (1908), 30 All. 352; affirmed on appeal, *Bhawani Kunwar* v. *Himmat Bahadur* (1911), 33 All. 342; 15 C. W. N. 466; 13 Bom. L. R. 354.

[8] *Asharam Sadhani* v. *Chandi Churn Mukerjee* (1908), 13 C. W. N. 147.

Right to alienate extends to all property.

The right to alienate for purposes of necessity extends to all property which has come to a woman as such restricted heir.

Where a share has been allotted to a widow on partition with a co-widow, she can alienate it for necessity.[1] She cannot without necessity alienate property even if it has been made over to her for her maintenance.[2]

Family business.

The restrictions on a Hindu widow's power of alienation are not relaxed in reference to an ancestral family business which has devolved upon her. In all such cases the authority of the manager to pledge ancestral estate without the consent of the parties interested depends on proof that alienation is necessary to pay the debts of the business; and the onus of proof rests on the party who seeks to enforce his security.[3]

Co-widows.

An alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow or of persons interested in the reversion.[4]

What are "necessary" purposes.

The following are proper objects for the alienation of the property:—

Religious ceremonies.

(*a*) The payment of the funeral or periodical *sradh* ceremonies and annual ceremonies of the husband,[5] or other last full owner, and of such religious ceremonies as he was bound to perform, as for instance his mother's *sradh*.[6]

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, a widow has a larger power of disposition than that which she possesses for purely worldly purposes."[7]

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[1] *Takurmani Singh* v. *Dai Rani Koeri* (1906), 33 Calc. 1079.

[2] *Seith Gobin Das* v. *Ranchore* (1871), 3 N. W. P. 324, see *ante*, p. 438.

[3] *Sham Sunder Lal* v. *Achhan Kunwar* (1898), 25 I. A. 183; 21 All. 71; 2 C. W. N. 729. See *ante*, pp. 274, 275.

[4] *Subbammal* v. *Avudaiyammal* (1906), 30 Mad. 3.

[5] *Mutteeram Kowar* v. *Gopaul Sahoo* (1873), 11 B. L. R. 416; 20 W. R. C. R. 187; *Lakshminarayana* v. *Dasu* (1887), 11 Mad. 288; *Chumun Lall* v. *Gunput Lall* (*Lalla*) (1871), 16 W. R. C. R. 52; *Junmejoy Mullick* (*Chowdhry*) v. *Russomoyee Dossee* (1868), 1 B. L. R. 418, note; 10 W. R. C. R. 309; "Daya-Bhaga," chap. xi. s. i. para. 61. In *Tatayya* v. *Ramakrishnamura* (1910), 34 Mad. 288, at p. 290, the Court said: "We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner."

[6] *Junmejoy Mullick* (*Chowdhry*) v. *Russomoyee Dossee* (*Sreemutty*) (1868), 11 B. L. R. 418, note; 10 W. R. C. R. 309.

[7] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529, at p. 551; 2 W. R. P. C. 61, at p. 64.

A woman inheriting as mother would not apparently have any power to sell for the religious benefit of her son.[1]

Pilgrimage.

A pilgrimage by a widow for her husband's religious benefit, as by a *sradh* at Gya, might justify an alienation,[2] but a pilgrimage for her own religious benefit,[3] although it may indirectly benefit her husband,[4] does not justify an alienation, except perhaps of a small portion.[5]

It has been held in Allahabad that a feast given on return from a pilgrimage even for the religious benefit of the husband does not justify an alienation,[6] but a different view has been entertained in Calcutta.[7] The expenses of the feast are, it is submitted, part of the expenses of the pilgrimage.

Gifts.

In some old cases gifts of a small portion of the corpus of the husband's property to Brahmins and to idols were upheld,[8] and in a recent case a gift of a very small portion of the property by a daughter was justified.[9] Modern authority would apparently, in most cases, repudiate such gifts on the ground that they conduce to the spiritual benefit of the widow alone,[10] but where the gift is for the spiritual benefit of the husband it may be upheld.[11] It is clear that a dedication of a substantial portion of the property for the endowment of an idol is voidable.[12]

The digging of a tank, although a meritorious act, does not justify a sale,[13] except where it is necessary in connection with a temple founded by the deceased husband.[14]

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[1] *Harmanaye Narain Singh* v. *Ram Gopal Achari* (1913), 17 C. W. N. 782.

[2] *Mohamed Ushruf* v. *Brojessuree Dossee* (1873), 11 B. L. R. 118; 19 W. R. C. R. 426; *Mutteeram Kowar* v. *Gopaul Sahoo* (1873), 11 B. L. R. 416; 20 W. R. C. R. 187. See *Tarini Prasad Chatterjee* v. *Bholanath Mookerjee* (1891), 21 Calc. 190, note; *Ganpat* v. *Tulsiram* (1911), 36 Bom. 88; 13 Bom. L. R. 860. Cf. *Ram Kant Chuckerbutty* v. *Chunder Narain Dutta Roy* (1878), 2 C. L. R. 474.

[3] *Huro Mohun Audhikaree* v. *Auluck Monee Dassee* (1864), 1 W. R. C. R. 252. See *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (1909), 13 C.W. N. 544, at p. 547; S. C. on appeal, *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1914), 42 I. A. 64; 42 Calc. 876; 19 C. W. N. 370; 17 Bom. L. R. 426.

[4] *Rama* v. *Ranga* (1885), 8 Mad. 552.

[5] See *Ibid.*, at p. 554.

[6] *Makhan Lal* v. *Gayan Singh* (1910), 33 All. 255.

[7] *Dinanath Ghose* v. *Hrishikesh Pal* (1914), 18 C. W. N. 1303.

[8] *Jugjeevun Nuthoojee* v. *Deo Sunkar Kaseeram* (1812), 1 Borr. 394; *Kupoor Bhuwanee* v. *Sevukram Seoshunkur* (1815), 1 Borr. 405. Here there was a gift of a house. In *Chooneelal* v. *Jussoo Mull Deveedas* (1813), 1 Borr. 55, the law officer of the Sadr Adawlut held that the widow cannot make a gift of landed property to her priest. See *Ram Kawal Singh* v. *Ram Kishore Das* (1895), 22 Calc. 506; *Ram Chunder Surma* v. *Gungagovind Bunhoojiah* (1826), 4 Ben. Sel. R. 117 (new edition, 147).

[9] *Tatayya* v. *Ramakrishnamma* (1910), 34 Mad. 288.

[10] *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy* (1864), 1 W. R. C. R. 48.

[11] *Khub Lal Singh* v. *Ajodhya Misser* (1915), 43 Calc. 574.

[12] *Chooramani Dasi* v. *Baidya Nath Naik* (1904), 32 Calc. 473; *Ram Kawal Singh* v. *Ram Kishore Das* (1895), 22 Calc. 506. See *Bhaskar Trimbak Acharya* v. *Mahadev Ramji* (1869), 6 Bom. H. C. O. C. 1; *Harmanaye Narain Singh* v. *Ram Gopal Achari* (1913), 17 C. W. N. 782. It has been held that she can do so with the consent of the reversioners, *Brajanath Baisakh* v. *Matilal Baisakh* (1869), 3 B. L. R. O. C. 92.

[13] *Runjeet Ram Koolal* v. *Mahomed Waris* (1873), 2 W. R. C. R. 49. See, however, *futwah* of pundits in *Kashinath Basak* v. *Harasundari Dasi* (1826), "Vyavastha Darpana," 2nd ed., 101.

[14] *Khub Lal Singh* v. *Ajodhya Misser* (1915), 43 Calc. 574.

Payment of debts.

(*b*) The payment of the debts of a previous full owner,[1] for the payment of which no provision has been made.[2]

She is not obliged to pay such debts out of income.[3]

As in the case of the widow the obligation is one of religious duty, she is entitled to alienate in respect of debts which are barred by the law of limitation,[4] or by any other enactment, which permits the debtor to evade the obligation,[5] unless they have been repudiated by her husband.[6] In the case of debts contracted for immoral purposes she would, it is submitted, only be entitled to alienate where the debt can be enforced in a court of law.

She must in paying such debts act fairly to all the creditors as a body, and not unduly prefer any of them.[7] She is not obliged to wait until the creditor has brought pressure by way of a suit,[8] but there must be a pressure of some kind.[9]

Government Revenue, etc.

(*c*) The payment of Government Revenue or other dues the non-payment of which would imperil the estate,[10] such as the satisfaction of a decree, even if such decree was obtained against a female representing the estate.[11]

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[1] Colebrooke's "Digest," chap. i. p. 270; "Vyavahara Mayukha," chap. v. s. iv. paras. 17, 20; *Debi Dayal Sahoo* v. *Bhan Pertab Singh* (1903), 31 Calc. 433; 8 C. W. N. 408; *Jayanti Subbiah* v. *Alamelu Mangamma* (1902), 27 Mad. 45; *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1877), 2 Bom. 494, at p. 499; cases note 10, below. See *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 766; *Hemchund Mujoomdar* v. *Tara Munnee* (*Mussumaut*) (1811), 1 Ben. Sel. R. 359 (new edition, 481); *Lukmeeram* v. *Khooshalee* (1818), 1 Borr. 412, and cases cited in Norton's L. C. pp. 641, 642; *Soorjoo Pershad* v. *Krishan Pertab Bahadoor Sahie* (*Rajah*) (1869), 1 N. W. P. 46; *Felaram Roy* v. *Bagalanand Banerjee* (1910), 14 C. W. N. 895; in *Bhau Babaji* v. *Gopala Mahipati* (1886), 11 Bom. 325, an alienation for the purpose of paying the debts of a father-in-law was upheld.

[2] In *Tiluck Roy* v. *Phoolman Roy* (1867), 7 W. R. C. R. 450, the debt was provided for under the terms of a farm lease. As to debts paid by a widow during her husband's lifetime, see *ante*, p. 479.

[3] *Ramasami Chetti* v. *Mangaikarasu Nachiar* (1894), 18 Mad. 113.

[4] *Chimnaji Govind Godbole* v. *Dinkur Dhondev Godbole* (1886), 11 Bom. 320; *Kondappa* v. *Subba* (1889), 13 Mad. 189; *Udai Chunder Chuckerbutty* v. *Ashutosh Das Mozumdar* (1893), 21 Calc. 190. In this respect her position is different from that of a manager. See *ante*, p. 277.

[5] As, for instance, the Dekhan Agriculturists' Relief Act (XVII. of 1879), *Bhau Babaji* v. *Gopala Mahipati* (1886), 11 Bom. 325.

[6] *Bhagwat* v. *Nivratti* (1914), 39 Bom. 113; 16 Bom. L. R. 738.

[7] *Rangilbhai Kalyandas* v. *Vilayak Vishnu* (1887), 11 Bom. 666.

[8] *Kaihur Singh* v. *Roop Singh* (1871), 3 N. W. P. 4.

[9] *Ante*, p. 479.

[10] *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753; W. Macnaghten's "Hindu Law," vol. ii. p. 293; *Gooroopersaud Jena* v. *Muddunmohun Soor*, Ben. S. D. A., 1856, p. 980; *Sreenath Roy* v. *Ruttunmalla Chowdhrain*, Ben. S. D. A., 1859, p. 421.

[11] *Karimuddin* (*Munshi*) v. *Gobind Krishna Narain* (*Kunwar*) (1909), 36 I. A. 138; 31 All. 497; 13 C. W. N. 1117; 11 Bom. L. R. 911.

The payment of the debts of a family business, which forms part of the estate, justifies an alienation.[1]

Costs.

(*d*) Reasonable [2] costs of necessary litigation "in recovering or preserving the estate, or in defending her rights," [3] or other necessary legal expenses, such as the cost of obtaining a succession certificate,[4] but not the costs of imprudent litigation which is not for the benefit of the estate.[5]

Repairs, etc.

(*e*) The protection and preservation of the estate,[6] such as the cost of repairs and other expenses necessary to the well-being of the estate.[7]

The construction of a house which is not necessary for the management of the estate would not justify an alienation [8] except perhaps where it is impossible to provide accommodation otherwise for the widow's residence.

It has been held that she cannot sell for the purpose of paying a personal debt, such as arrears of road cess,[9] payable under the Public Demands Recovery Act,[10] but as this is a debt which may be incurred in the proper management of the estate, it is submitted that it cannot be laid down generally that a widow cannot alienate for this purpose.

Her maintenance.

(*f*) To provide for her maintenance, and the expenses of such religious ceremonies as a woman in her position is required to perform.[11]

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[1] *Jagarnath Prasad* v. *Jaikishun Prasad* (1916), 1 Pat. L. J. 16.

[2] *Bhimaraddi* v. *Bhaskar* (1904), 6 Bom. L. R. 628.

[3] *Karimuddin* (*Munshi*) v. *Gobind Krishna Narain* (*Kunwar*) (1909), 36 I. A. 138; 31 All. 497; 13 C. W. N. 1117; 11 Bom. L. R. 911; *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (1903), 31 Calc. 433; 8 C. W. N. 408; *Amjad Ali* v. *Moniram Kalita* (1885), 12 Calc. 52. See *Pannalal Seal* v. *Bamasundari Dasi* (*Srimati*) (1871), 6 B. L. R. 732; *Phool Koer* (*Mussamut*) v. *Dabee Pershad* (1869), 12 W. R. C. R. 187.

[4] *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753.

[5] *Indar Kuar* v. *Lalta Prasad Singh* (1882), 4 All. 532.

[6] *Soorjoo Pershad* v. *Krishan Pertab Bahadoor Sahie* (*Rajah*) (1869), 1 N. W. P. 46.

[7] See *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (1884), 10 Calc. 823.

[8] *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshaya* (1911), 35 Mad. 560.

[9] *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753.

[10] Act VII. (Ben. C.) of 1880.

[11] *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1889), 5 Bom. 450; *Soorjoo Pershad* v. *Krishan Pertab Bahadoor Sahie* (*Rajah*) (1869), 1 N. W. P. 46; *Sreenath Roy* v. *Ruttunmalla Chowdhrain*, Ben. S. D. A., 1859, p. 421; "Daya-Krama Sangraha," chap. i. s. ii. para. 6; Strange's "Hindu Law," vol. i. p. 246; vol. ii. p. 251; *Raj Chunder Paramanik* (*Doe dem*) v. *Bulloram Biswas* (1837), 1 Fulton, 133. Where the next heir agrees to support her she cannot sell, Macnaghten's "Hindu Law," vol. ii. p. 211. She can provide for her maintenance out of the estate even though she be living with a paramour, *Amjad Ali* v. *Moniram Kalita* (1885), 12 Calc. 52.

Maintenance of dependent members of family.

(*g*) To provide for the maintenance of dependent members of her family, whom her husband or the other last full owner (as the case may be) was legally or morally bound to support, and for their marriages or other necessary religious ceremonies,[1] on a reasonable scale, having regard to the amount of the property and the position of the family.[2]

The maintenance of the grandsons of the husband,[3] and the performance of the *sradh* of a mother [4] have been held to justify a sale.

Marriage of daughter.

(*h*) To provide for the marriage expenses of a daughter,[5] or other female member of the family.[6]

In one case where a Hindu widow borrowed a sum of money for the purpose of defraying the marriage expenses of a son's daughter, the Court held that such sum was recoverable from the reversioners after the widow's death, although it was not charged on the estate.[7]

Gift to daughter on marriage.

When upon the death of a Hindu governed by the Mitakshara law, his property is taken by the widow, a gift by the widow to her daughter, on the occasion of her marriage, out of the estate of her husband is within her power, provided that the portion so given is reasonable in amount,[8] *i.e.* that it does not exceed one-fourth of the property.[9] There would be the same right according to the Bengal school.[10]

It has been held that she can borrow money for the purpose of cultivating the estate, so that she may be maintained, *Oodey Singh (Koer)* v. *Phool Chund* (1873), 5 N. W. P. 197.

[1] *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (1903), 31 Calc 433; 8 C. W. N. 408; *Ganpat* v. *Tulsiram* (1911), 13 Bom. L. R. 860 (betrothal of daughter); *Preaj Narain* v. *Ajodhyapurshad* (1848), 7 Ben. Sel. R. 513 (new edition, 602) (marriage of daughter); *Rustam Singh* v. *Moti Singh* (1896), 18 All. 474 (Do.). In this last case the mother alienated property which had descended to her from her father.

[2] See *Doorhyar Roy* v. *Dulsinghar Singh* (1869), 12 W. R. C. R. 367.

[3] *Chumun Lall* v. *Gunput Lall (Lalla)* (1871), 16 W. R. C. R. 52. A grandfather cannot be compelled to maintain his grandchildren, *ante*, p. 211, but he is morally bound to maintain them.

[4] *Srimohan Jha* v. *Brijbehary Misser* (1909), 36 Calc. 753.

[5] *Chumun Lall* v. *Gunput Lall (Lalla)* (1871), 16 W. R. C. R. 52; *Makhan Lal* v. *Gayan Singh* (1910), 33 All. 255.

[6] See *ante*, pp. 235, 271, 289.

[7] *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429; see *post*, pp. 492, 493.

[8] *Churamun Sahu* v. *Gopi Sahu* (1909), 37 Calc. 1, at p 8; 13 C. W. N. 994, at p. 999; *Abhesang Tirabhai* v. *Raisang Fatesang* (1912), 14 Bom. L. R. 602. This applies also when the widow has taken as mother, *Ramasami Ayyar* v. *Vengidusami Ayyar* (1898), 22 Mad. 113.

[9] *Churamun Sahu* v. *Gopi Sahu* (1909), 13 C. W. N. 994, at p. 999; "Mitakshara," chap. i. s. vii. paras. 5-14.

[10] *Kashinath Basak* v. *Harasundari Dasi* (1826), "Vyavastha Darpana," 2nd ed., 97, at p. 101. The provision of a portion for a daughter is there put as a religious purpose; see *ante*, p. 33.

This rule has been extended to a gift at the time of the *gouna* or *dwiragaman* ceremony, when the wife, upon the attainment of puberty, goes to reside with her husband,[1] but although presents are given at such ceremony, it is, it is submitted, very doubtful whether a gift of a portion of the husband's immovable property is permissible. The *gowna* ceremony is not in law a part of the marriage ceremony. A gift to a son-in-law on the occasion of the marriage has been also upheld.[2]

The estate is not liable for the marriage expenses of a daughter's daughter, although the son-in-law is a *ghar jamai, i.e.* resides with his mother-in-law.[3]

Latitude in exercise of powers.

" A widow, like a manager [4] of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, as Mr. Justice West says in *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*,[5] ' she acts fairly to the expectant heirs.' " [6]

A family arrangement by which the widow granted an *ijara* of the property was upheld by the Judicial Committee in *Bijoy Gopal Mukerji* v. *Girendra Nath Mukerji* (1914), 41 Calc. 793; 18 C. W. N. 673; 16 Bom. L. R. 425.

A sale by a widow in order to pay off a mortgage, which is not yet due, may be justifiable.[7]

Mortgage.

A widow "is not bound to mortgage any portion of her husband's estate, if that would be more prejudicial to her than a sale, by reducing her income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security." [8]

It is sometimes impossible for a widow to arrange a sale of a portion of the property exactly sufficient to pay the amount required. When under these circumstances she sells more, the sale would be justified.[9]

When she raises money by a mortgage she can borrow only to the extent of the necessity.[10]

Rate of interest.

The reversioners are only bound by a rate of interest which is reasonable under the circumstances.[11]

The form of the alienation is immaterial provided that the document

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[1] *Churamun Sahu* v. *Gopi Sahu* (1909), 37 Calc. 1; 13 C. W. N. 994.

[2] *Ramasami Ayyar* v. *Vengidusami Ayyar* (1898), 22 Mad. 113.

[3] *Narainbati* v. *Ramdhari Singh* (1916), 20 C. W. N. 734; 1 Pat. L. J. 81.

[4] *Ante*, p. 272.

[5] (1886), 11 Bom. 320, at p. 324.

[6] *Venkaji Shridhar* v. *Vishnu Babaji Beri* (1893), 18 Bom. 534, at p. 536.

[7] *Ibid.*

[8] *Singam Setti Sanjivi Kondaya* v. *Draupadi Bayamma* (1907), 31 Mad. 153, at pp. 154, 155; *Nabakumar Haldar* v. *Bhabasundari Debi* (1869), 3 B. L. R. A. C. 375; *Phool Chund Lall* v. *Rughoobuns Suhaye* (1868), 9 W. R. C. R. 107; cf. *Mohanund Mondul* v. *Nafur Mondul* (1899), 26 Calc. 820; 3 C. W. N. 470.

[9] See *Kamikhaprasad Roy* v. *Jagadamba Dasi* (*Srimati*) (1870), 5 B. L. R. 508, at p. 520; *Felaram Roy* v. *Bagalanand Banerjee* (1910), 14 C. W. N. 895; *Chatranarayan* (*Lala*) v. *Uba Kunwari* (1868), 1 B. L. R. (A. C.) 201; *Sugeeram Begum* v. *Judoobuns Suhye* (1868), 9 W. R. C. R. 284.

[10] See *Lalit Panday* v. *Sridhar Deo Narayan Singh* (1870), 5 B. L. R. 176.

[11] *Stevens* v. *Janki Ballabh* (1913), 19 C. W. N. 80.

purports to deal with the whole interest in the property. The fact that the widow purported to alienate the property as guardian of a son, whose adoption turned out to be invalid, was held not to depreciate the validity of the alienation.[1]

Avoidance of alienation.

An alienation by a restricted owner in excess of her powers is voidable by the reversioners. It is not void.[2]

The reversioner may ratify the alienation,[3] or he may treat it as a nullity.[4] It is not necessary for him to sue to set it aside.[5]

It cannot be avoided by any one except the reversioner.[6]

As to compensation on setting aside an alienation, see *ante*, p. 307.

Consent of reversioners to alienation.

A sale of the whole of her interest in the property by a female holding a qualified estate, although it be not on account of a legal necessity, transfers the whole interest in the property, if it be effected with the consent, at the time of the transaction or thereafter,[7] of all[8] the presumptive reversioners, that is to say, of all the members of the class of persons who would be entitled to succeed to a full estate in the property, if the widow had died at the moment of the sale,[9] or

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[1] *Parbhu Lall (Lala)* v. *Mylne* (1887), 14 Calc. 401.

[2] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi (Srimati)* (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R. 602; *Kishori Pal* v. *Bhusai Bhuiya (Sheikh)* (1909), 14 C. W. N. 106; *Deonandan Pershad* v. *Udit Narayan Singh* (1914), 18 C. W. N. 940.

[3] *Modhu Sudan Singh (Raja)* v. *Rooke* (1897), 24 I. A. 164; 25 Calc. 1; 1 C. W. N. 433; *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji* (1903), 30 Calc. 990; 7 C. W. N. 864; S. C. (on appeal) (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R 602; *Hayes* v. *Harendra Narain* (1904), 31 Calc. 698.

[4] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi (Srimati)* (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R. 602.

[5] *Harihar Ojha* v. *Dasarathi Misra* (1905), 33 Calc. 257; 9 C. W. N. 636.

[6] *Deonandan Pershad* v. *Udit Narayan Singh* (1914), 18 C. W. N. 940.

[7] *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1907), 35 I. A. 1; 30 All. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348. See *Khawani Singh* v. *Chet Ram* (1916), 39 All. 1.

[8] *Radha Shyam Sircar* v. *Joyram Senapati* (1890), 17 Calc. 896.

[9] *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1907), 35 I. A. 1; 30 All. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529, at p. 551; 2 W. R. P. C. 61, at p. 64; *Srimuty Dibeah (Rany)* v. *Koond Luta (Rany)* (1847), 4 M. I. A. 292; *Rangappa Naik* v. *Kamti Naik* (1908), 31 Mad. 366; *Pilu* v. *Babaji* (1909), 34 Bom. 165; 11 Bom. L. R. 1291; *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (1884), 10 Calc. 1102; *Brajanath Baisakh* v. *Matilal Baisakh* (1869), 3 B. L. R. O. C. 92; *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (1878), 5 Calc. 44; 3 C. L. R. 384; *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (1900), 25 Bom. 129; 2 Bom. L. R. 820; *Kishen Geer (Mohunt)* v. *Busgeet Roy* (1870), 14 W. R. C. R. 379; *Trilochun Chuckerbutty* v. *Umesh Chunder Lahiri* (1880), 7 C. L. R. 57;

(if the consent be subsequent to the sale) at the time of the consent.

The alienation can in that case be supported by the theory of relinquishment.[1] Sir G. D. Banerjee ("Law of Marriage," 4th ed., pp. 237, 239) contends with reason that a transfer of a portion of the property is valid.

Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained,[2] though there may be cases in which special circumstances may render the strict enforcement of the rule impossible.[3] "At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." [4]

Where the alienation by the widow does not amount to a complete relinquishment of all her interest in the property of her husband the consent of the reversioners is *primâ facie*, and cogent evidence of necessity,[5] or inquiry, but can be rebutted by evidence showing the absence of such necessity or inquiry.[6]

Kali Kishore Pal v. *Abdul Karim* (1897), 2 C. W. N. 132; *Radha* (*Mussamut*) v. *Kour* (*Mussamut*), W. R. 1864, C. R. 148; *Abhesang Tirabhai* v. *Rai Sang Fatesang* (1912), 14 Bom. L. R. 602; *Mallik Saheb* v *Mallikarjunappa* (1913), 15 Bom. L. R. 1142; *Narayana Aiyar* v. *Rama Aiyar* (1913), 38 Mad. 396. See *Debi Prosad Chaudhury* v. *Golap Bhagat* (1913), 40 Calc. 721; 17 C. W. N. 701. See also cases collected in Norton's "Leading Cases," pp. 626, 627. For a contrary view, see *Ramphal Rai* v. *Tula Kuari* (1883), 6 All. 116; *Varjivan Rangji* v. *Ghelji Gokaldas* (1881), 5 Bom. 563, which must now be considered as overruled.

[1] *Post*, p. 490. *Suressur Misser* (*Chowdhury*) v. *Mohesh Ram Mesrain* (*Musstt*) (1915), 20 C. W. N. 142.

[2] *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209, at p. 228; 3 B. L. R. P. C. 57, at p. 63; 12 W. R. P. C. 47, at p. 50; *Radha Shyam Sircar* v. *Joy Ram Senapati* (1890), 17 Calc. 896. In a Bombay case (*Vinayak* v. *Govind* (1900), 25 Bom. 129; 2 Bom. L. R. 820), where a man died leaving a widow, a sister, and her son, the Court upheld an alienation by the widow with the consent of the sister's son on the ground that he was the only male reversioner, and that his consent showed the propriety of the sale.

[3] *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1907), 35 I. A. 1, at p. 16; 30 All. 1, at p. 21; 12 C. W. N. 74, at p. 83; 9 Bom. L. R. 1348.

[4] *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209, at p. 228; 3 B. L. R. P. C. 57, at p. 63; 12 W. R. P. C. 47, at p. 50; *Varjivan Rangji* v. *Ghelji Gokaldas* (1881), 5 Bom. 563, at p. 571; *Vinayak* v. *Govind* (1909), 25 Bom. 129, at p. 139; 2 Bom. L. R. 820. In *Ram Krishna Kuppuswami* v. *Tripurabai* (1911), 13 Bom. L. R. 940, it was held that the consent of the nearest reversioner did not validate an alienation.

[5] *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (1914), 41 Calc. 793; 18 C. W N. 673; 16 Bom. L. R. 425; *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1914), 42 I. A. 64; 42 Calc. 876; 19 C. W. N. 370; 17 Bom. L. R. 426.

[6] *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721; 17 C. W. N. 401; *Nabin Chandra Saha* v. *Hem Chandra Ray* (1913), 19 C. W. N. 265.

As, for instance, a sale of a portion of the estate,[1] a mortgage,[2] or a long lease executed to save the property from destruction.[3]

A sale or other alienation of the whole property with the consent of some only of the reversioners stands upon the same footing.[4]

Where the immediate reversioner would, if she succeeded, be a restricted owner, both her consent and that of subsequent reversioners would be necessary.

The consent of a female reversioner, who would in turn become a restricted owner, is not sufficient.[5] It might, it is submitted, be some evidence to corroborate other evidence of necessity.

There was a controversy as to the basis upon which the right of the widow to sell with the consent of the reversioners rested. According to one view the consent derived its force from the power supposed to reside in a widow of accelerating by the surrender of her own interest the interests of the reversioners;[6] but the doctrine of acceleration consequent on relinquishment is in theory inapplicable where the widow transfers for a price or retains an interest in the purchase-money.[7] The other view was that the consent of the persons interested to oppose the transaction evidenced

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[1] *Gopeshwar Misra* v. *Durgamani Baishnabi* (1913), 17 C. W. N. 1062; *Marudamuthu Nadan* v. *Srinivasa Pillai* (1898), 21 Mad. 128; *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (1908), 32 Mad. 206; see *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721; 17 C. W. N. 701; *Pulin Chandra Mandal* v. *Bolai Mandal* (1908), 35 Calc. 939; 12 C. W. N. 837; *Rangappa Naik* v. *Kamti Naik* (1908), 31 Mad. 366, at p. 370. In *Bajrangi Singh* v. *Manokarnika Bukhsh Singh* (1907), 35 I. A. 1; 30 All. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; the sales of successive portions which made up the whole estate, and in *Vinayak* v. *Govind* (1900), 25 Bom. 129; 2 Bom. L. R. 820, a sale of a portion only were upheld.

[2] *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1914), 42 I. A. 64; 42 Calc. 876; 19 C. W. N. 370; 17 Bom. L. R. 426; *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721; 17 C. W. N. 701; *Hari Kishen Bhagat* v. *Bajrang Sahai Singh* (1909), 13 C. W. N. 544, at p. 548.

[3] *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (1914), 41 Calc. 793; 18 C. W. N. 673; 16 Bom. L. R. 425.

[4] *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721, at p. 476; 17 C. W. N. 701, at p. 731.

[5] *Goolab Sing (Kooer)* v. *Rao Kurun Sing* (1871), 14 M. I. A. 176; 10 B. L. R. 1; *Bepin Behari Kundu* v. *Durga Charan Banerji* (1908), 35 Calc. 1086; 12 C. W. N. 914. See *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1902), 25 Mad. 731. There is some authority in Bombay that even where the female reversioner would on succession take an absolute estate her consent would not be sufficient, *Varjivan* v. *Ghelji* (1881), 5 Bom. 563; approved of in *Vinayak* v. *Govind* (1900), 25 Bom. 129, at pp. 134, 135; 2 Bom. L. R. 820. See, however, *Mallik Saheb* v. *Mallikarjunappa* (1913), 38 Bom. 224; 15 Bom. L. R. 1142, in which a different view was acted upon.

[6] *Post*, pp. 490, 491.

[7] *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721, at pp. 779, 780; 17 C. W. N. 701, at p. 733.

its propriety, if not its actual necessity.[1] There can be no doubt that such consent is very strong evidence of necessity, and also that such reversioner either immediate or subsequent, as consented to the alienation will be estopped from disputing it.[2]

A ratification stands on the same footing as a consent.[3] The form of consent is immaterial.

Form of consent.

Consent may take the form of signature or attestation of the document,[4] and sometimes subsequent acquiescence may imply consent, as for instance by the receipt of rent from the holder of a tenure created by the widow.[5]

The consent to be of any effect must be given with full knowledge of the circumstances and of the effect of the transaction and with an intelligent intention to consent to such effect.[6] It must be free from any defect, such as fraud or mistake, which would vitiate a contract. It must be given in good faith, and not for an indirect purpose.[7]

Consent by a *purdahnashin* lady requires the strictest possible proof that she was fully aware of the circumstances and of her rights, and that no advantage was taken of her position.[8]

The mere omission to object, or to take steps to have the transaction set aside, does not amount to consent.

A sale which has been rendered effective by the necessary consent cannot be questioned by any reversioner subsequently born[9] or adopted.[10]

The assent of the reversioner does not affect other reversioners where the widow does not purport to deal with anything beyond her own interest.[11]

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[1] *Vinayak* v. *Govind* (1900), 25 Bom. 129, at p. 133; 2 Bom. L. R. 820; *Pilu* v. *Babaji* (1909), 34 Bom. 165; 11 Bom. L. R. 1291. See *Madhub Chunder Hajrah* v. *Gobind Chunder Banerjee* (1868), 9 W. R. C. R. 350.

[2] Indian Evidence Act (I. of 1872), s. 115; *Gopaul Chunder Manna* v. *Gour Monee Dossee* (1866), 6 W. R. C. R. 52; *post*, p. 507.

[3] *Narayana* v. *Rama* (1913), 38 Mad. 396, at p. 402.

[4] *Muteeoollah (Sheikh)* v. *Radhabinode Missur*, Ben. S. D. A. 1856, p. 596. As to the effect of an attestation, see *Abhoy Churn Ghose* v. *Attarmoni Dassee* (1898), 13 C. W. N. 931. Mere attestation does not import concurrence; *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1914), 42 I. A. 64; 42 Calc. 876; 19 C. W. N. 370; 17 Bom. L. R. 426; see *Narayana* v. *Rama* (1913), 38 Mad. 396.

[5] *Mohesh Chunder Bose* v. *Ugra Kant Banerjee* (1875), 24 W. R. C. R. 127.

[6] *Sham Sunder Lal* v. *Achhan Kunwar* (1898), 25 I. A. 183, at p. 189; 21 All. 71, at p. 80; 2 C. W. N. 729, at p. 733; *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1914), 42 I. A. 64; 42 Calc. 876; 19 C. W. N. 370; 17 Bom. L. R. 426.

[7] *Kolandaya Sholagan* v. *Vedamuthu Sholagan* (1896), 19 Mad. 337, where the transfer was made for the purpose of defeating the claims of a subsequent reversioner.

[8] See *Bhagwat Dayal Singh (Raja Rai)* v. *Debi Dayal Sahu* (1908), 35 I. A. 48; 35 Calc. 420; 12 C. W. N. 393; 10 Bom. L. R. 230; and cases cited in Ameer Ali and Woodroffe's Indian Evidence Act (I. of 1872), notes to s. 111; see *post*, p. 511.

[9] *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (1900), 25 Bom. 129; 1 Bom. L. R. 820.

[10] *Raj Kristo Roy* v. *Kishoree Mohun Majoomdar* (1865), 3 W. R. C. R. 14; *ante*, pp. 199, 200.

[11] *Rup Narain* v. *Gopal Devi (Mussammat)* (1909), 36 I. A. 103; 36 Calc. 780; 13 C. W. N. 920; 11 Bom. L. R. 833. See *Jiwan Singh* v. *Misri Lal* (1895), 23 I. A. 1; 18 All. 146.

A reversioner cannot delegate to his executor the option of assenting to the sale.[1]

The fact that the widow obtained a benefit from the alienation, *e.g.* when as the result of a compromise an interest in the property is given to her, does not avoid the alienation, if it be in other respects unobjectionable.[2]

Gift.

Even with the consent of the reversioners a gift by the restricted owner to any one but the next reversioners is invalid.[3]

A reversioner who consented may be estopped from disputing the gift.[4]

Surrender of restricted estate.

A widow, or other female with a restricted estate, can surrender[5] her whole estate[6] in the whole property[7] to the then next reversioners, whose estate is thereby accelerated and who obtain thereby as full a title as if they had taken directly from the last full owner,[8] but such relinquishment does not affect prior alienations.[9]

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[1] *Hayes* v. *Harendra Narain* (1904), 31 Calc. 698.

[2] *Suressur Misser* (*Chowdhury*) v. *Mohesh Rami Mesrain* (*Musst*) (1915), 20 C. W. N. 142.

[3] *Bakhtawar* v. *Bhagwana* (1910), 32 All. 176; *Ramphal Rai* v. *Tula Kuari* (1883), 6 All. 116; *Abdulla* v. *Ram Lal* (1911), 34 All. 129; *Khawani Singh* v. *Chet Ram* (1916), 39 All. 1; *Raja Dei* v. *Umed Singh* (1912), 34 All. 207, where there was a gift by the widow to her daughter's son with the consent of her daughter.

[4] *Bakhtawar* v. *Bhagwana* (1910), 32 All. 176.

[5] A disclaimer may have the same effect as a surrender, see *Rujoneekant Mitter* v. *Premchand Bose* (1862), Marsh, 241; 1 Hay, 518.

[6] *Rangappa Naik* v. *Kamti Naik* (1908), 31 Mad. 366, at pp. 369, 370; *Beharilal* v. *Madholal Ahir Gyawal* (1891), 19 I. A. 30, at p. 32; 19 Calc. 236, at p. 241; *Moti Raiji* v. *Laldas Jibhai* (1916), 41 Bom. 93; 18 Bom. L. R. 954; *Janak Keshori Kuar* v. *Debi Prasad Singh* (*Babu*) (1917), 2 Pat. L. J. 490.

[7] *Beharilal* v. *Madholal Ahir Gyawal* (1891), 19 I. A. 30; 19 Calc. 236. (The observations of the Judicial Committee in that case dispose, it is submitted, of the views entertained in *Duli Singh* v. *Sundar Singh* (1892), 14 All. 377, and *Madan Mohan* v. *Puran Mal* (1884), 6 All. 288); *Annada Kumar Roy* v. *Indra Bhusan Mukhopadhya* (1907), 12 C. W. N. 49; *Hemchunder Sanyal* v. *Sarnamoyi Debi* (1894), 22 Calc. 453; *Hunsraj* v. *Monghibai* (*Bai*) (1905), 7 Bom. L. R. 622. See *Raj Kishore* v. *Durga Charan Lal* (1906), 29 All. 71; *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (1884), 10 Calc. 1102; *Noferdoss Roy* v. *Modhu Soondari Burmonia* (1880), 5 Calc. 732; 5 C. L. R. 551; *Jadumani Debi* (*Srimati*) v. *Saroda Prosanno Mookerjea* (1856), 1 Boul. 120; *Shama Soonduree* v. *Shurut Chunder Dutt* (1867), 8 W. R. C. R. 500; *Marudamathu Nadan* v. *Srinivasa Pillai* (1898), 2 Mad. 128, at p. 133. For older cases see Norton's Leading Cases, pp. 627, 628.

[8] *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (1874), 22 W. R. C. R. 393.

[9] *Subbamma* v. *Subramanyam* (1915), 39 Mad. 1035.

She can surrender to a female reversioner.[1] She cannot surrender to some only of the next reversioners.[2]

There is a conflict of decisions as to whether a surrender to subsequent reversioners with the consent of the immediate reversioners is valid.[3]

There is, it is submitted, nothing to prevent a relinquishment of all rights in the estate by the immediate reversioner, but no relinquishment short of this would be sufficient.[4]

The surrender is not effectual if it imposes on the reversioners obligations, which would not have existed if the property had devolved on them by inheritance.[5]

An arrangement which, besides a surrender of the whole estate, includes an absolute gift of half to the widow is entirely ineffectual so far as such half is concerned,[6] but there is nothing to prevent an arrangement for the widow's maintenance on a surrender by her,[7] or an arrangement by which a part of the property is transferred to some one else.[8]

Where the widow or other female owner has abandoned all worldly affairs the estate of the reversioners may be expedited.[9] Abandonment of worldly affairs.

A widow or other restricted female owner cannot apparently relinquish a portion only of the estate in favour even of the whole body of the reversioners.[10]

The powers of a Hindu widow, or other restricted heir, who takes under a will, depend upon the terms of the will.[11] Powers under will.

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[1] *Bhupal Ram* v. *Lachma Kuar* (1888), 11 All. 253. See *Udhar Singh* v. *Ranee Koonwer (Mussumat)* (1866), 1 Agra, 234; *Rup Ram* v. *Rewati (Musammat)* (1910), 32 All. 582.

[2] *Hem Chunder Sanyal* v. *Sarnamayi Debi* (1894), 22 Calc. 355. See *Annada Kumar Roy* v. *Indra Bhusan Mukhopadhya* (1907), 12 C. W. N. 49.

[3] *Raja Dei* v. *Umed Singh* (1912), 34 All. 207; *Protap Chunder Roy Chowdhry* v. *Joy Monee Dabee Chowdhrain (Sreemutty)* (1864), 1 W. R. C. R. 98.

[4] Cf. *ante*, p. 487.

[5] *Sriramulu Naidu* v. *Andalammal* (1906), 30 Mad. 145.

[6] *Hem Chunder Sanyal* v. *Sarnamayi Debi* (1894), 22 Calc. 354; *Kanuram Deb* v. *Kashi Chandra Sharma Chowdhuri* (1909), 14 C. W. N. 226. See, however, per Sankaran Nair, J., in *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (1908), 31 Mad. 446, at p. 450. In a similar case the transaction was upheld on the ground that the reversioners were estopped, *Rangappa Naik* v. *Kamti Naik* (1908), 31 Mad. 366.

[7] *Kundee Lall (Lalla)* v. *Kalee Pershad (Lalla)* (1874), 22 W. R. C. R. 307.

[8] *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (1908), 31 Mad. 446.

[9] See *Hafzoonissa Begum* v. *Radhabinode Misser*, Ben. S. D. A. 1856, p. 595.

[10] *Rangappa Naik* v. *Kamti Naik* (1908), 31 Mad. 366, at p. 370; *Marudamuthu Nadan* v. *Srinivasa Pillai* (1898), 21 Mad. 128, at p. 152; *Debi Prosad Chowdhury* v. *Golap Bhagat* (1913), 40 Calc. 721, at p. 750; 17 C. W. N. 701, at p. 718; *Suressur Misser (Chowdhury)* v. *Mohesh Rani Mesrain (Musstt)* (1915), 20 C. W. N. 142. *Contrâ* *Kanuram Deb* v. *Kashi Chandra Sarma Chowdhuri* (1909), 14 C. W. N. 226. See *ante*, p. 490.

[11] *Chundermoney Dossee* v. *Hurry Doss Mitter* (1880), 5 C. L. R. 557.

If the will merely confers the interest which the law would give her a heiress, the general law would apply.

Powers given by Court.

Where a widow or other restricted female owner has obtained special powers from a Court under the provisions of an Act of the Legislature, her power to deal with the property is derived from the order of the Court.[1]

If she has obtained letters of administration her powers are those of an administratrix.[2]

If she obtains permission to alienate under s. 90 of the Probate and Administration Act,[3] she can confer an absolute title irrespective of necessity or of the consent of the reversioners.[4]

Debts not charged on property.

There is a difference of opinion as to whether the reversioners are responsible for debts incurred by a widow from legal necessity, but in respect of which no document charging the property beyond the widow's lifetime has been executed by the widow.

Where there is no legal necessity for the debts, it is clear that the reversioners are not bound to pay them.

There can be no reasonable doubt that reasonable trade debts in respect of a family business are payable out of the trade assets whether they are secured or not.[5]

The difficulty arises in cases where they were not incurred in respect of such business. The Allahabad High Court has declined to hold the reversioners responsible.[6] The Madras High Court,[7] and a Full Bench of the Calcutta High Court [8] have held them responsible. A recent decision of the Calcutta High Court has adopted the contrary view,[9] but the Full Bench case does not appear to have been cited.

In one case the Bombay High Court exempted the reversioners,[10] but

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[1] See *Bhugwan Dass* v. *Luchmee Narain* (1865), 2 W. R. M. A. 19.

[2] *Loganada Mudali* v. *Ramasvami* (1863), 1 Mad. H. C. 384.

[3] Act V. of 1881.

[4] *Kamikya Nath Mukerjee* v. *Hari Churn Sen* (1899), 26 Calc. 607.

[5] *Sakrabai Nathubai* v. *Maganlal Mulchand* (1901), 26 Bom. 206; 3 Bom. L. R. 738.

[6] *Dhiraj Singh* v. *Manga Ram* (1897), 19 All. 300; *Shiamanand* v. *Har Lal* (1896), 18 All. 471. See *Kallu* v. *Faiyaz Ali Khan* (1908), 30 All. 394.

[7] *Regella Jogayya* v. *Nimushakari Venkataratnamma* (1910), 33 Mad. 492; *Veerabhadra Aiyan* v. *Marudaga Nachiar* (1910), 34 Mad. 188; *Maharaja of Bobbili* v. *Zamindar of Chundi* (1910), 35 Mad. 108.

[8] *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (1884), 10 Calc. 823; *Ramcoomar Mitter* v. *Ichamoyi Dasi* (1880), 6 Calc. 36; 6 C. L. R. 429.

[9] *Giribala Dassi* v. *Srinath Chandra Singh* (1908), 12 C. W. N. 769. Cf. *Prosunno Kumar Nandi* v. *Umedur Raja Chowdhry* (1908), 13 C. W. N. 353.

[10] *Gadgeppa Desai* v. *Apaji Jivanrao* (1879), 3 Bom. 237.

in a recent case a Full Bench of the same Court considered that they are bound.[1]

It is submitted that ordinarily reversioners are not responsible. A manager cannot bind the coparceners, or a minor owner personally,[2] although he may bind them by a mortgage or sale. Why should a widow be in a different position ?

If credit be given to the estate, the creditors would generally insist upon security. Ordinarily it is to the present holder—the widow, to whom the creditors look for payment.

Wards of Courts of Wards.

In the case where a female restricted owner, who has acquired the estate as a wife, daughter, or mother, is a ward of a Court of Wards, the powers of alienation given to the Courts of Wards by the several Acts constituting such Courts can only be exercised where the necessity is such as would have justified the owner in alienating the property herself.[3]

Disposal by will.

A woman cannot (even, it is submitted, with the consent of the reversioners) by will dispose of the property in which she has only a restricted interest.[4]

Proceedings by or against limited heir as representing estate.

A widow or other female restricted owner fully represents the estate in legal or other proceedings with reference thereto.

Where a decree has been made against the last full owner, it can be against the female holder as representing the estate.[5]

When a suit is pending against a Hindu defendant at the time of his death intestate, his heir, even though she be a female, should be put in his place in such suit, but her liability is limited to the assets which come to her hands.

When the decree is against the representative of a deceased person, a purchaser at a sale in execution of the decree is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative.[6]

If the widow does not represent the estate nothing passes by the sale,[7]

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[1] *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (1901), 26 Bom. 206; 3 Bom. L. R. 738.

[2] *Waghela Rajsanji* v. *Masludin* (*Shekh*) (1887), 14 I. A. 89; 11 Bom. 551; *Indur Chunder Singh* v. *Radhakishna Ghose* (1892), 19 I. A. 90; 19 Calc. 507; *Ranmal Singji* (*Maharana Shri*) v. *Vadilal Vakhatchand* (1894), 20 Bom. 61; *Surendra Nath Sarkar* v. *Atul Chandra Roy* (1907), 34 Calc. 892.

[3] See Bengal Ward's Manual, 1909, pp. 19, 20.

[4] *Goburdhun Nath* v. *Onoop Roy* (1865), 3 W. R. C. R. 105.

[5] *Natha Hari* v. *Jamni* (1871), 8 Bom. H. C. A. C. 37; *Hari Vydianathayyan* v. *Minakshi Ammal* (1882), 5 Mad. 5.

[6] *Natha Hari* v. *Jamni* (1871), 8 Bom. H. C. A. C. 37, at pp. 41, 42.

[7] *Siva Bhagiam* v. *Palani Padiachi* (1882), 4 Mad. 401; *Ramasami Chetti* v. *Saluckai Tevar* (1875), 8 Mad. H. C. 186; *Jatha Naik* v. *Venktapa* (1880), 5 Bom. 14; *Akoba Dada* v. *Sakharam* (1885), 9 Bom. 429; *Subbanna* v. *Venkatakrishnan* (1888), 11 Mad. 408; *Alukmonee Dabee* v. *Banee Madhub Chuckerbutty* (1878), 4 Calc. 677; 3 C. L. R. 473.

unless the persons in whom the estate was vested are substantially represented by the widow.[1]

Suit to recover property.

As she represents the estate the widow or other female restricted owner is the person who should sue for such portion of the estate as is in the hands of others.

If she neglect to sue, apparently the immediate reversioner, and failing him, a subsequent reversioner, can sue.[2]

When decree binds reversioners.

The reversioners are bound by a decision fairly obtained on a question directly and substantially in issue and necessary to be decided,[3] in a suit against a female restricted owner, as representing the estate, or in a suit by such restricted owner,[4] "unless it could be shown that there had not been a fair trial of the right in that suit—or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit" . . . by any person claiming in succession to such restricted owner.[5]

A decision in a suit by or against the limited heir not as representing the estate, but on matters personal to her, as, for instance, a decree against her for rent,[6] or on account of a tortious act,[7] does not bind the reversioners.[8] For example, they are not liable for a wrongful act committed by her.[9] In some cases where she has acted for the benefit of the estate, the estate may be liable for mesne profits.[10]

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[1] There are cases where a widow is put on the record as representing her minor sons. In those cases the question is what is actually sold; see *Achut* v. *Manjunath* (1896), 21 Bom. 539, and cases cited in Trevelyan's "Law of Minors," 5th ed., p. 290, note 5.

[2] See *Joy Mooruth Kooer* v. *Buldeo Singh* (1874), 21 W. R. C. R. 444; *Chunder Koomar Gangooly* v. *Raj Kishen Banjerce* (1870), 14 W. R. C. R. 322.

[3] *Muljibhai Narbharam* v. *Patel Lakhmidas* (1911), 36 Bom. 127, at p. 131; 13 Bom. L. R. 1035, at p. 1037.

[4] See *Risal Singh* v. *Balwant Singh* (1915), 37 All. 496.

[5] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543, at p. 608; 2 W. R. P. C. 31, at p. 37; *Partab Narain Singh* v. *Trilokanath Singh* (1884), 11 I. A. 197; 11 Calc. 186; *Hurrinath Chatterjee* v. *Mothoor Mohun Goswami (Mohunt)* (1893), 20 I. A. 183; 21 Calc. 8; *Madan Mohan Lal* v. *Akbaryar Khan* (1905), 28 All. 241; *Jharula Das* v. *Jalandhar Thakur* (1912), 39 Calc. 887; *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya* (1912), 35 Mad. 560; *Ghelabai* v. *Javer (Bai)* (1912), 37 Bom. 172; 14 Bom. L. R. 1142; *Mohendra Nath Biswas* v. *Shamsunnessa Khatum* (1914), 19 C. W. N. 1280; *Hanuman Prasad Singh* v. *Bhagauti Prasad* (1897), 19 All. 357, at p. 371; *Sachit* v. *Budhua Kuar* (1886), 8 All. 429; *Nand Kumar* v. *Radha Kuari* (1876), 1 All. 282.

[6] *Bireshur Das Dey* v. *Kamal Kumar Dutt* (1912), 17 C. W. N. 337.

[7] *Nafar Chandra Pal Chowdhury* v. *Kamini Kumar Lahiri* (1912), 18 C. W. N. 542.

[8] *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285.

[9] See *Sadasi Koer* v. *Ramgobind Singh* (1911), 15 C. W. N. 357.

[10] *Lalji Sahay* v. *Goberdhone Jha* (1909), 15 C. W. N. 859, note.

The majority of the Court held in *Risal Singh* v. *Balwant Singh* (1915), 37 All. 496, that the reversioners were bound by a decree in a suit brought by a widow to set aside an adoption.

It is the duty of the widow to protect the estate, and if she collusively allow judgment to be given and execution to be taken out, the sale will be set aside.[1] She is not bound to contest a just claim.[2] A decree properly obtained in an undefended suit binds the estate.[3]

Compromise.

The Allahabad High Court has held that the reversioners can only be bound by decree made after a full contest in a *bonâ fide* litigation, and are not bound by a compromise, even though it be followed by a decree.[4]

It has been held in Madras that a decree passed on a compromise into which the widow enters will have no higher effect against the reversioners than a contract entered into by her.[5]

In Bengal it has been held [6] that a widow, as representative of the entire estate in the litigation, has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision. "It is, of course, possible that the trust thus reposed in the widow may be abused without detection, as may the very large discretion which, as the law now stands, she undoubtedly possesses in other matters; but, on the whole, we think it will be found most favourable for the heirs that she should have the power of making an honest compromise at every stage of the proceedings."

It is, it is submitted, clear that a compromise or an award [7] which amounts to an alienation without necessity, or is otherwise distinctly disadvantageous to the reversioners,[8] or is made by the restricted heir for her own personal advantage only,[9] would not bind them, and would be treated as an alienation. Where the compromise amounts to a *bonâ fide* settlement of disputes, and was arrived at with due care and caution,[10] it will be upheld.[11]

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[1] *Parekh Ranchor* v. *Vakhat* (*Bai*) (1886), 11 Bom. 119; see that case as to the law of limitation.

[2] *Subbammal* v. *Avudaiyammal* (1906), 30 Mad. 3.

[3] *Gurnak Prasad* v. *Jai Narain Lal*(19 2), 34 All. 385.

[4] *Mahadei* v. *Baldeo* (1907), 30 All. 75; *Gobind Krishna Narain* v. *Khunni Lal* (1907), 29 All. 487 (reversed on appeal, see below, note 12); *Sant Kumar* v. *Deo Saran* (1886), 8 All. 365; *Ram Sarup* v. *Ram Dei* (1906), 29 All. 239. See *Sheo Narain Singh* v. *Khurgo Koerry* (1882), 10 C. L. R. 337. In *Jeram Laljee* v. *Veerbai* (1905), 5 Bom. L. R. 885, the Court said: "I think that in the absence of authority to the contrary, it would be unsafe to treat anything short of a decree in a suit contested to the end as coming within the ruling in the *Shiva Ganga* case."

[5] *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya* (1912), 35 Mad. 560.

[6] *Tarini Charan Ganguli* v. *Watson* (1869), 3 B. L. R. A. C. 437, at pp. 444, 445; 12 W. R. C. R. 413, at p. 417; *Kanhaiya Lal* v. *Kishori Lal* (1916), 38 All. 679.

[7] *Moti Raiji* v. *Laldas Jebhoi* (1916), 41 Bom. 93; 18 Bom. L. R. 954.

[8] *Indro Kooer* (*Mussamut*) v. *Abdool Burkat* (*Shaikh*) (1870), 14 W. R. C. R. 146. See *Kambinayani Timmaji* v. *Kambinayani Subbaraju* (1910), 33 Mad. 473.

[9] See *Imrit Konwur* v. *Roop Narain Singh* (1880), 6 C. L. R. 76; *Janak Keshori Kuar* v. *Debi Prasad Singh* (*Babu*) (1917), 2 Pat. L. J. 495.

[10] *Kumarasami Odayar* v. *Subramania Iyer* (1916), 31 Mad. L. J. 87.

[11] See *Khunni Lal* (*Lala*) v. *Gobind Krishna Narain* (*Kunwar*) (1911), 38 I. A. 87; 23 All. 356; 15 C. W. N. 545; 13 Bom. L. R. 427; *Hiran*

A compromise which affects only her personal rights is unimpeachable.

Parties to suit.

It may be sometimes safer to make the next reversioners parties to a suit in order to bind them,[1] but the widow fully represents the estate, and the rights of subsequent reversioners will not be affected by the inclusion of the immediate reversioners in the suit. In *Srinath Das* v. *Hari Pada Mitter*,[2] Jenkins, J., drew a distinction between cases in which the charge was created by the widow and those in which it was not created by her. There is, it is submitted, no ground for this distinction. There is no reason why next reversioners any more than subsequent reversioners should be made parties.

Costs of suit.

The estate is liable for the costs of a suit brought against the widow and defended by her on account of the estate.[3] It may also be liable for the costs of an unsuccessful suit brought by her as representing the estate.[4]

The reversioners are not bound by a decree made after the death of the widow against her representatives.[5]

Sale in execution of decree.

A sale in execution of a decree, made against a widow or other female restricted owner and enforcing merely a personal claim, will only transfer the life interest of the widow.[6]

This, it is submitted,[7] applies also when the decree is for a debt incurred on the personal security of the widow, although such debt may have been incurred for legal necessity.[8]

It applies to a claim for rent accrued due after the death of the last full owner.[9]

Bibi (Mussamut) v. *Sohan Bibi* (1914), 18 C. W. N. 928; *Bihari Lal* v. *Daud Husain* (1913), 35 All. 240; *Upendra Nath Bose* v. *Bindesri Prosad* (1915), 20 C. W. N. 210.

1 See Mayne's "Hindu Law," 8th ed., p. 896, note (*y*).

2 (1899), 3 C. W. N. 637.

3 *Chunder Coomar Roy* v. *Gonesh Chunder Doss* (1886), 13 Calc. 283.

4 *Ramkishore Chuckerbutty* v. *Kally Kanto Chuckerbutty* (1880), 6 Calc. 479; 8 C. L. R. 1.

5 *Kailash Chandra Bose* v. *Girija Sundari Debi* (1912), 16 C. W. N. 658.

6 *Nugender Chunder Ghose* v. *Kaminee Dossee (Sreemutty)* (1867), 11 M. I. A. 241; 8 W. R. P. C. 17; *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285; see *Mohima Chunder Roy Chowdhuri* v. *Gouri Nath Dey Chowdhuri* (1897), 2 C. W. N. 162; *Jugol Kishore* v. *Jotindromohun Tagore (Maharajah)* (1884), 11 I. A. 66; 10 Calc. 985; *Narana Maiya* v. *Vasteva Karanta* (1893), 17 Mad. 208; *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (1875), 2 I. A. 275; 1 Calc. 133; 24 W. R. C. R. 306; *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (1875), 15 B. L. R. 142; 23 W. R. C. R. 174; *Kisto Moyee Dassee* v. *Prosunno Narain Chowdhry* (1866), 6 W. R. C. R. 304; *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (1889), 16 Calc. 511; *Ram Shewuk Roy* v. *Sheo Gobind Sahoo* (1867), 8 W. R. C. R. 519; *Radha Mohun Mundul* v. *Soshi Bhoosun Biswas* (1878), 3 C. L. R. 530.

7 See *ante*, p. 492.

8 *Kallu* v. *Faiyaz Ali Khan* (1908), 30 All. 394.

9 *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285; *Mahomed Sadat Ali Milki* v. *Hara Sundari Debya* (1912), 16 C. W. N. 1070; *Kristo Gobind Majumdar* v. *Hem Chunder Chowdhry* (1889), 16 Calc. 511; *Bireshar Das Dey* v. *Kamal Kumar Dutt* (1912), 17 C. W. N. 337; *Rameswar Mondal* v. *Provabati Debi* (1914), 19 C. W. N. 313.

A sale in execution of a decree made against the restricted owner as representing the estate, will bind the estate if the whole interest be sold, and the debt upon which the decree was based was one which would have bound the reversion, either as being a debt of the last male owner, or as being a debt in respect of a transaction by which she could, and did bind the estate.[1] Otherwise her interest alone is affected by the sale.[2]

As to a sale of the reversion, see *post*, p. 500.

The question frequently arises as to whether on the proceedings the whole interest passes.[3] "In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.[4]

This question depends upon the nature of the interest sold [5] and the terms of the decree in execution.[6] In order to ascertain what passed by the sale, the Court may look at the judgment,[7] or the pleadings,[8] or the proceedings or decree.[9]

In the case of a sale in execution of a decree made on a mortgage and executed by a widow the question as to whether more than the widow's personal interest passed depends also upon whether there was necessity for the mortgage.[10]

Where property is sold to satisfy several decrees, some of which bind the estate, the Court will not interfere with the possession of the purchaser.[11]

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1 *Jugol Kishore* v. *Jotindro Mohun Tagore* (*Maharajah*) (1884), 11 I. A. 66; 10 Calc. 985.

2 *Ranjit Singh* (*Raja*) v. *Ram Chandra Mookerjee* (1899), 4 C. W. N. 415; *Nabin Chandra Saha* v. *Hem Chandra Ray* (1913), 19 C. W. N. 265; *Rameswar Mondal* v. *Provabati Debi* (1914), 19 C. W. N. 313.

3 See *Baroda Kanta Chattopadhya* v. *Jatindra Narain Roy* (1895), 22 Calc. 974.

4 *Bissessur Lall Sahoo* v. *Luchmessur Singh* (*Maharajah*) (1876), 6 I. A. 233, at p. 238; 5 C. L. R. 477, at p. 481; *General Manager of the Raj Durbhunga* v. *Ramaput Sing* (*Maharajah Coomar*), 14 M. I. A. 605; 10 B. L. R. 294; 17 W. R. C. R. 459; *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (1863), Marshall, 614; W. R. F. B. R. 199.

5 The mere fact that the right, title, and interest of the widow is being sold does not preclude the Court from ascertaining from the judgment or proceedings what was actually sold; *Jugol Kishore* v. *Jotindro Mohun Tagore* (*Maharajah*) (1884), 11 I. A. 66; 10 Calc. 985; *General Manager of Raj Durbhunga* v. *Ramaput Sing* (*Maharajah Coomar*) (1872), 14 M. I. A. 605; 10 B. L. R. 294; 17 W. R. C. R. 459; and see cases above, note 4.

6 *Ram Lal Shookool* v. *Akhoy Charan Mitter* (1903), 7 C. W. N. 619.

7 *Jugol Kishore* v. *Jotindro Mohun Tagore* (*Maharajah*) (1884), 11 I. A. 66; 10 Calc. 985.

8 *Srinath Das* v. *Hari Pada Mitter* (1899), 3 C. W. N. 637.

9 *Zuhoorul Huq* (*Chowdhry*) v. *Gooroo Churn Roy* (1871), 15 W. R. C. R. 329.

10 *Bistobehari Sahoy* v. *Biajnath Prasad* (*Lala*) (1871), 7 B. L. R. 213; 16 W. R. C. R. 49.

11 *Debendro Narain Roy* (*Rajah*) v. *Chundernath Roy* (*Coomar*) (1873), 20 W. R. C. R. 30.

An execution sale in satisfaction of debts contracted by the widow and the next reversioner has not the effect of a sale by her and that reversioner.[1]

Sale for arrears of Revenue.

In a sale for arrears of Government revenue payable in respect of the share of an estate in the possession of an Hindu female restricted owner, the whole interest passes.[2]

As to a sale for arrears of rent, see *Chowdhry Zuhoorul Huq* v. *Goorco Churn Roy* (1871), 15 W. R. C. R. 329; *Raja Ram Banerjee* v. *Sonatun Roy* (1875), 23 W. R. C. R. 404; *Braja Lal Sen* v. *Jiban Krishna Roy* (1898), 26 Calc. 285.

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[1] *Mohima Chunder Roy Chowdhuri* v. *Gouri Nath Dey Chowdhuri* (1897), 2 C. W. N. 162. See *ante*, pp. 486, 487.

[2] *Debi Das Chowdhuri* v. *Bipro Charan Ghosal* (1895), 22 Calc. 641; *Banalata Dasi* v. *Monmotha Nath Goswami* (1907), 11 C. W. N. 821; Act XI. of 1859 (Revenue Sale law), s. 54.

CHAPTER XVI.

REVERSIONERS AND THEIR RIGHTS.

UNTIL the expiration of the estate of the widow or other restricted female heir, *i.e.* on her death (or possibly on her abandoning all interests in worldly affairs [1]), it is impossible to ascertain who will succeed to the property. **Interest of reversioners.**

"The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death." [2]

During the lifetime of the widow or other limited heir the interest of a reversioner is not vested. It amounts merely to a "*spes successionis.*" [3]

"None of these reversioners, speaking strictly, can be said individually to possess any certain or tangible interest in the reversion; for the person who will get it is only he who shall actually survive the qualified proprietor and who shall occupy at her death the position of heir to the last full owner, and who that will be it is of course impossible to say." [4]

A reversioner is not entitled to a declaration of his right to succeed.[5] He has sufficient interest to entitle him to challenge the will of the last male owner.[6]

He has not an interest entitling him to redeem, during the lifetime of the widow, property mortgaged by the widow's husband;[7] but if he

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[1] *Ante*, p. 361.

[2] *Moniram Kolita* v. *Kerry Kolitany* (1880), 7 I. A. 115, at p. 154; 5 Calc. 776, at pp. 789, 790; 6 C. L. R. 322, at pp. 332, 333.

[3] Cases *post*, p. 500, note 2.

[4] *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390, at p. 391.

[5] *Kathama Natchiar* v. *Dorasinga Tever* (1875), 2 I. A. 169; 15 B. L. R. 83; 23 W. R. C. R. 314; *Janaki Ammal* v. *Narayana Sami Aiyer* (1916), 43 I. A. 207; 39 Mad. 634; 20 C. W. N. 1323; 18 Bom. L. R. 856. See Specific Relief Act (I. of 1877), s. 42; *Shama Soonduree Chowdhrain* v. *Jumoona Chowdhrain* (1875), 24 W. R. C. R. 86, explaining *Brinda Dabee Chowdhrain* v. *Pearee Lall Chowdhry* (1868), 9 W. R. C. R. 460.

[6] *Syama Charan Baisya* v. *Prafulla Sandari Gupta* (1915), 19 C. W. N. 882.

[7] *Ram Chandar* v. *Kallu* (1908), 30 All. 497; Transfer of Property Act (IV. of 1882), s. 91.

pays money to save the sale of the property in execution of a decree for arrears of rent or revenue he is entitled to sue the defaulting widow for the amount.[1]

The interest of the reversioner is incapable of being transferred,[2] or of being renounced,[3] or of being attached in execution of a decree.[4] In case of his insolvency it does not vest in the Official Assignee or other assignee in insolvency.[5]

An agreement to divide the reversion when it should fall in, creates no vested right, but only a right to claim specific performance.[6] No effect can be given to a contract for sale of a reversion even after the reversion has fallen in.[7]

A compromise between the reversioner and the widow acknowledging the right of the widow under a will is within the competence of the reversioners,[8] but they cannot bind subsequent reversioners by any compromise of their rights.[9]

There is nothing to prevent the reversion being sold in execution of a decree in respect of a debt due by the last male owner, where the widow's interest cannot be sold.[10]

Where there are several reversioners entitled successively to succeed to an estate held for life by a widow or other restricted owner, no one of such reversioners can be held to claim through or derive his title from another reversioner, even if that other

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[1] Act IX. (Contracts) of 1872, s. 69; *Pankhabatti Chaudhurani* v. *Nani Lal Singh* (1913), 18 C. W. N. 778.

[2] Transfer of Property Act (IV. of 1882), s. 6 (*a*); *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (1908), 32 Mad. 206; *Manickam Pillai* v. *Ramalinga Pillai* (1905), 29 Mad. 120; *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390, at p. 399; *Hargawan Magan* v. *Baijnath Das* (1909), 32 All. 88; *Jagannath* v. *Dibbo* (1908), 31 All. 53; *Nund Kishore Lal* v. *Kanee Ram Tewary* (1902), 29 Calc. 355; 6 C. W. N. 395, in which it was held that *Sham Sunder Lall* v. *Achhan Kunwar* (1898), 25 I. A. 183; 21 All. 71; 2 C. W. N. 729 (S. C. in Court below, *Achhan Kunwar* v. *Thakur Das* (1895), 17 All. 125), overruled *Brahmadeo Narayan* v. *Harjan Singh* (1898), 25 Calc. 778; *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya* (1911), 35 Mad. 560. See *Doolichand* v. *Birj Bhookun Lal Awasti* (1880), 10 C. L. R. 61, at p. 65; 6 C. L. R. 528, at p. 538; *Kanti Chandra Mukerji* v. *Ali-i-Nabi* (1911), 33 All 414; *Janaki Ammal* v *Narayanasami Aiyer* (1916), 43 I A. 207; 39 Mad. 634; 20 C. W. N. 1323; 18 Bom. L. R. 856.

[3] *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (1906), 30 Mad. 201.

[4] Code of Civil Procedure (Act V. of 1908), s. 60 (*m*).

[5] *Babu Anaji* v. *Ratnoji Krishnarav* (1895), 21 Bom. 319. See Insolvency (Presidency towns) Act (III. of 1909), s. 52; Provincial Insolvency Act (III. of 1907), s. 2 (*e*).

[6] *Pindripolu Sooraparaju* v. *Pindripolu Veerabhadrudu* (1907), 30 Mad. 486.

[7] *Jaganadha Raju (Sri)* v. *Prasada Rao (Sri Rajah)* (1915), 39 Mad. 554.

[8] *Olati Pulliah Chetti* v. *Varadarajulu Chetti* (1908), 31 Mad. 474.

[9] See *Ram Shankar Lal* v. *Ganesh Prasad* (1907), 29 All. 451. As to a compromise by reversioners to impartible estates, see *Harpal Singh* v. *Lekhraj Kunwar* (1908), 30 All. 406, and cases therein cited.

[10] *Chidambaramma* v. *Hussainamma* (1915), 39 Mad. 565.

happens to be his father, but each derives his title from the last full owner.[1]

They do not derive their title from the restricted owner.[2]

There is no privity of estate between one reversioner and another as such, and consequently an act or omission by one reversioner, except so far as he can consent to an alienation by the limited female owner,[3] cannot bind other reversioners, whether or not they happen to be his heirs.[4]

Suit to restrain waste.

Although even an immediate reversioner has no interest higher than a hope of succession,[5] he or she,[6] if not barred by estoppel,[7] limitation,[8] or otherwise, can sue to restrain a widow, or other restricted owner, or her assignee,[9] from committing waste,[10] or injuring the property; [11] and in the discretion of the Court can obtain a declaration that an alienation,[12] or any unauthorized act which is injurious to the estate or to the reversion, or will be likely to injure the interests of the reversioners, is voidable at their instance,[13] except during the life of the restricted owner.[14]

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[1] *Govinda Pillai* v. *Thayammal* (1904), 28 Mad. 57; *Bhagwanta* v. *Sukhi* (1899), 22 All. 33; *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62, at p. 71; 9 C. W. N. 25, at p. 31; *Shib Shankar Lal* v. *Soni Ram* (1909), 32 All. 33, at p. 41; *Chhiddu Singh* v. *Durga Dei* (1900), *ibid.* 382; *ante*, p. 365.

[2] *Shib Shankar Lal* v. *Soni Ram* (1909), 32 All. 33, at p. 41; affirmed on appeal; *Soniram* v. *Kanhaiya Lal* (1913), 35 All. 227; 17 C. W. N. 605; 15 Bom. L. R. 489.

[3] *Ante*, pp. 486, 487.

[4] See *Bahadur Singh* v. *Mohar Singh* (1901), 29 I. A. 1; 24 All. 94; 6 C. W. N. 169; 4 Bom. L. R. 233; *Govinda Pillai* v. *Thayammal* (1904), 28 Mad. 57; *Veerayya* v. *Gangamma* (1912), 36 Mad. 570; *Manokarani Debi* (*Srimutty*) v. *Haripada Mitter* (1914), 18 C. W. N. 718. See *post*, pp. 505–507 as to the effect of a declaratory suit by a reversioner.

[5] *Ante*, p. 499.

[6] Specific Relief Act (I. of 1877), ss. 39, 54, illus. (m); *Golab Koonwer* (*Musst*) v. *Shib Sahai* (1867), 2 Agra, 54; *Gunesh Dutt* v. *Lall Muttee Kooer* (*Mussamut*) (1871), 17 W. R. C. R. 11.

[7] *Ante*, p. 489.

[8] *Post*, p. 504.

[9] *Gobindmani Dasi* v. *Shamlal Bysak* (1864), B. L. R. F. B. R. 48; W. R. F. B. R. 165; *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa* (1866), 3 Mad. H. C. 116, at p. 119.

[10] *Chatu Misser* v. *Jeeva Misser* (1880), 6 C. L. R. 588. See *ante*, p. 473.

[11] *Kathama Natchiar* v. *Dorasinga Tever* (1875), 2 I. A. 169, at p. 191; 15 B. L. R. 83, at p. 119; 23 W. R. C. R. 314, at p. 322; *Shurut Chunder Sein* v. *Muthooranath Pudatick* (1867), 7 W. R. C. R. 303.

[12] This includes a division among the female members of a family after a collusive arbitration, *Ram Sarup* v. *Ram Dei* (1906), 29 All. 239. It includes a mortgage by conditional sale (*Odit Narain Singh* v. *Dhurm Mahtoon*, W. R. 1864, C. R. 263), or any other form of mortgage. As to a compromise by the restricted owner, see *ante*, pp. 495, 496.

[13] Specific Relief Act (I. of 1877), s. 42, illus. (e), *Mahomed Shumsool Hooda* (*Moulvie*) v. *Shewukram* (1874),

For note [14] see next page.

If the transaction be by a written instrument the Court can order it to be delivered up and cancelled.[1]

The reversioner can also, it is submitted, sue to protect the estate from any injury, against the happening of which the limited owner is not taking sufficient precautions.

There must be an injury to the reversion.[2] Where the widow purports only to convey her own interest there is no ground for interference, but where the act is an injury to the reversioners the Court will interfere.[3]

"The principle upon which a reversionary heir is allowed to maintain a declaratory suit, although it may turn out in the end that he is not the person who actually gets the property, is that otherwise evidence regarding the true character of the alienation might disappear and be not available when required." [4]

"The plaintiff would indeed have a right to restrain the widow from waste; but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindu law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate. And it is obvious that, if heirs in expectancy were debarred from suing to protect waste until the succession had actually accrued, the waste would, in most cases, be past remedy, and the estate irretrievably impaired." [5]

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2 I. A. 7; 14 B. L. R. 226; 22 W. R. C. R. 609; *Isri Dut Koer* v. *Hansbutti Koerain* (*Mussumut*) (1883), 10 I. A 150; 10 Calc. 324; 13 C. L. R. 418; *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1869), 13 M. I. A. 209; 3 B. L. R. P. C. 57; 12 W. R. P. C. 47; *Goolab Sing* (*Kooer*) v. *Kurun Sing* (*Rao*) (1871), 14 M. I. A. 176; 10 B. L. R. 1; *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1876), 3 I. A. 72; 1 Calc. 289; 25 W. R. C. R. 235; *Balbhadra* v. *Bhawani* (1907), 34 Calc. 853; 11 C. W. N. 956; *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (1894), 22 Calc. 354; *Chottoo Misser* v. *Jemah Misser* (1880), 6 Calc. 198; 6 C. L. R. 588; *Adi Deo Narain Singh* v. *Dukharan Singh* (1883), 5 All. 532; *Upendranarain Myti* v. *Gopeenath Bera* (1883), 9 Calc. 817; 12 C. L. R. 356; *Gangayya* v. *Mahalakshmi* (1886), 10 Mad. 90; *Gopichand* v. *Sujan Kuar* (1886), 8 All. 646; *Gobindmani Dasi* v. *Shamlal Bysak* (1864), B. L. R. F. B. R. 48; W. R. F. B. R. 165; *Oodoy Chand Jha* v. *Dhun Monee Debia* (1865), 3 W. R. C. R. 183; *Grose* v. *Amirtamayi Dasi* (1869), 4 B. L. R. O. C. 1; 12 W. R. O. J. 13; *Shewak Ram Roy* v. *Mohammed Shamsul Hoda* (1869), 3 B. L. R. A. C. 196; 12 W. R. C. R. 26; *Chuttur Narain* (*Lalla*) v. *Wooma Koonwaree* (*Mussamut*) (1867), 8 W. R. C. R. 273; *Bistobehari Sahoy* v. *Biajnath Prasad* (*Lala*) (1871), 7 B. L. R. 213; 16 W. R. C. R. 49; *Damoodur Surmah* v. *Mohee Kant Surmah* (1873), 21 W. R. C. R. 54; *Radha* (*Mussamut*) v. *Kour* (*Mussamut*), W. R. 1864, C. R. 148.

[14] *Ante*, p. 477.

[1] Specific Relief Act (I. of 1877), s. 39.

[2] See *Sreenarain Mitter* v. *Kishen Soondory Dassee* (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171; 19 W. R. C. R. 133.

[3] See *Ram Pershad Chowdry* v. *Jokhoo Roy* (1884), 10 Calc. 1003.

[4] Per Mookerjee, J., in *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62, at pp. 66, 67; 9 C. W. N. 25, at p. 27; *Chottoo Misser* v. *Jemah Misser* (1880), 6 Calc. 198; 6 C. L. R. 588; *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390, at p. 402. See *Behary Lall Mohurwar* v. *Madho Lall Shir Gyawal* (1874), 13 B. L. R. 22; 21 W. R. C. R. 430.

[5] *Pranputtee Koer* v. *Futteh Bahadoor Singh* (*Lalla*) (1863), 2 Hay,

Such suit is based on the danger to the inheritance common to all the reversioners.[1]

"Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."[2]

The granting of a merely declaratory decree[3] or of an injunction[4] is discretionary. Declaratory decree or injunction.

Where the reversioner sues to have an alienation made by the widow declared to be void except during her life, a strong case of expediency must be shown to justify a Court in refusing declaratory relief.[5]

In the exercise of its discretion the Court would refuse to make a declaration with regard to a mortgage for a small sum of money which might be paid off by the widow in her lifetime.[6]

In a case where the widow purported to deal with the property by will the Court gave the reversioner a declaratory decree,[7] but in another case[8] such decree was refused, and where an arrangement was one only to take effect on the widow's death the Court declined to give a decree.[9]

In a declaratory suit by reversioners during the lifetime of the widow it is premature to raise the question whether the alienees, having spent money upon the property purchased by them from the widow, are entitled to compensation.[10]

608, at p. 611; approved of in *Chummun Mohunt* v. *Rajendur Sohoo* (1867), 7 W. R. C. R. 119.

1 *Venkatanarayana Pillai* v. *Subbammal* (1915), 42 I. A. 125; 38 Mad. 406; 19 C. W. N. 641; 17 Bom. L. R. 468; *Janaki Ammal* v. *Narayanasami Aiyer* (1916), 43 I. A. 207; 39 Mad. 639; 20 C. W. N. 1323; 18 Bom. L. R. 856.

2 *Kathama Natchiar* v. *Dorasinga Tever* (1875), 2 I. A. 169, at p. 191, approved of in *Sheoparsan Singh* v. *Ramnandan Singh* (1916), 43 I. A. 91, at p. 98; 43 Calc. 694, at p. 705; 20 C. W. N. 738, at p. 744; 18 Bom. L. R. 397, at p. 406.

3 Specific Relief Act (I. of 1877), s. 42; *Sreenarain Mitter* v. *Kishen Soondoree Dassee* (1873), I. A. Sup. Vol. 149; 11 B. L. R. 171; 19 W. R. C. R. 133. The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under s. 42 of Act I. of 1877; *Jaipal Kunwar (Thakurain)* v. *Indar Bahadur Singh (Bhaiya)* (1904), 31 I. A. 67; 28 All. 238; 8 C. W. N. 465; 6 Bom. L. R. 495; *Sadut Ali Khan* v. *Abdool Gunneh (Khajeh)*, I. A. Sup. Vol. 165; 11 B. L. R. 203. As to interference with the discretion of Courts in India, by higher Courts in that country, see *Sant Kumar* v. *Deo Saran* (1886), 8 All. 365.

4 Specific Relief Act (I. of 1877), s. 52.

5 *Isri Dut Koer* v. *Hansbutti Koerain (Mussumut)* (1883), 10 I. A. 150; 10 Calc. 324; 13 C. L. R. 418.

6 *Chhotu Mahton* v. *Sheobarti Koer (Musst)* (1901), 5 C. W. N. 445.

7 *Kalian Singh* v. *Sanwal Singh* (1884), 7 All. 163.

8 *Umrao Kunwar* v. *Badri* (1915), 37 All. 422.

9 *Behary Lall Mohurwar* v. *Madho Lall Shir Gyawal* (1874), 13 B. L. R. 222; 21 W. R. C. R. 430.

10 *Rup Narain* v. *Gopal Devi (Mussammat)* (1909), 36 I. A. 103; 36 Calc. 780; 13 C. W. N. 920; 11 Bom. L. R. 833.

As to a suit by a reversioner to set aside an adoption, see *ante*, pp. 164–166.

Limitation of suit

A suit during the life of a Hindu female by a Hindu, who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation [1] of such land made by the female declared to be void except for her life or until her marriage, is barred unless it be brought within twelve years from the date of the alienation.[2]

This does not prevent a suit for possession after the death of the widow.[3]

As to the limitation in suits by subsequent reversioners, see *post*, pp. 507, 508.

Reversioner need not sue.

The reversioner is not obliged to sue during the lifetime of the restricted owner for relief in respect of an alienation or other act.[4] He can wait until the property vests in him, and then sue for possession.

Neglect to get in property.

When the restricted owner refuses to have any concern with the assets, or when she refuses or neglects to get in the property,[5] or acquiesces in a wrongful possession,[6] the reversioner can sue.

It is submitted that the reversioner can in some cases sue to clear a cloud from the title to the property when the restricted owner declines or omits to sue.[7]

Right to oust restricted owner.

The circumstance that there has been a wrongful alienation does not ordinarily entitle the reversioner to oust the restricted owner from possession, unless she has committed some act involving forfeiture of the property.[8]

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[1] See *ante*, p. 501, note 12.

[2] Limitation Acts, IX. of 1908, Sched. I. art. 125; XV. of 1877, Sched. II. art. 125

[3] *Mesraw (Musst)* v. *Girjanundan Tewari* (1908), 12 C. W. N. 857; *post*, p. 509.

[4] *Juggendronath Banerjee* v. *Rajendronath Holdar* (1867), 7 W. R. C. R. 357.

[5] *Radha Mohan Dhar* v. *Ram Dass Dey* (1869), 3 B. L. R. A. C. 362; 24 W. R. C. R. 86, note. See *Joy Mooruth Kooer* v. *Buldeo Singh* (1874), 21 W. R. C. R. 444; *Chunder Koomar Gangooly* v. *Rajkishen Banerjee* (1870), 14 W. R. C. R. 322.

[6] *Adi Deo Narain Singh* v. *Dukharan Singh* (1883), 5 All. 532; *Gunesh Dutt* v. *Lall Muttee Kooer (Mussumut)*, 17 W. R. C. R. 11

[7] See, however, *Suraj Bansi Kunwar (Mussamat)* v. *Mahipat Sing* (1871), 7 B. L. R. 669; 16 W. R. C. R. 18.

[8] *Haradhun Naug* v. *Issur Chunder Bose* (1866), 6 W. R. C. R. 222; *Kishnee (Mussumat)* v. *Khealee Ram* (1870), 2 N. W. P. 424; *Jwala Nath* v. *Kulloo* (1868), 3 Agra, 55; *Shib Koeree (Mussamut)* v. *Joogun Singh* (1867), 8 W. R. C. R. 155; *Loll Soonder Doss* v. *Hurry Kishen Doss* (1862), Marsh, 113; 1 Ind. Jur. O. S. 32; 1 Hay, 33.

An attempt at a false adoption of a son does not entail forfeiture or by itself justify the Court in appointing a receiver.[1]

In a case where the waste committed by the limited owner shows that she is quite incapable of managing the property, and only in such case, or where it is necessary to prevent waste or injury to the reversion [2] or to protect the estate, when she declines to take possession of it,[3] the Court may deprive her of the control and may appoint a manager or receiver.[4] It may, if it be for the benefit of the estate, nominate the reversioner to the management,[5] requiring him to pay the income to the widow. A similar course might be adopted where the widow has allowed the property to leave her hands or has neglected to get it in.[6]

A subsequent reversioner is not bound by a declaratory decree made in a suit brought by the immediate or any other reversioner,[7] such as a decree in a suit seeking to declare the widow's alienation invalid.[8] Subsequent reversioner.

The Court would probably in its discretion refuse to give a declaratory decree where the matter had been fully discussed in a suit brought by a reversioner who had antecedent rights.

A suit for such purpose does not abate on the death of the plaintiff, but can be continued by a subsequent reversioner.[9]

A suit for a declaration as to an alienation, or to restrain waste,[10] may be brought by a more distant reversioner, if the reversioners nearer in succession are in collusion with the holder

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[1] *Komul Monee Dossee* v. *Alhadmonee Dossee* (1864), 1 W. R. C. R. 256.

[2] *Jwala Nath* v. *Kulloo* (1868), 3 Agra, 55.

[3] See *Adi Deo Narain Singh* v. *Dukharan Singh* (1883), 5 All. 532.

[4] *Shama Soonduree Chowdhrain* v. *Jumoona Chowdhrain* (1875), 24 W. R. C. R. 86. See *Ex parte Mathusri Jijai Amba (Rani)* (1890), 13 Mad. 390.

[5] *Maharani (Musst)* v. *Nanda Lal Misser* (1868), 1 B. L. R. A. C. 27; 10 W. R. C. R. 73; *Gunesh Dutt* v. *Lall Muttee Kooer (Mussumut)* (1871), 17 W. R. C. R. 11; *Nundlal Baboo* v. *Bolakee Bebee*, Ben. S. D. A. 1854, p. 351; *Golukmonee Dassee* v. *Kishenpersad Kanoongoe*, Ben. S. D. A. 1859, p. 210; *Dinkishen Shatrah* v. *Gungadhur Mookerjee* (1863), 2 Hay, 582; *Adi Deo Narain Singh* v. *Dukharan Singh* (1883), 5 All. 532. See *Koroonamoyee Dasee* v. *Gobindnath Roy*, Ben. S. D. A. 1859, p. 944.

[6] *Radha Mohan Dhar* v. *Ram Das Dey* (1869), 3 B. L. R. A. C. 362; 24 W. R. C. R. 86, note.

[7] Act I. of 1877 (Specific Relief), s. 43.

[8] *Chhiddu Singh* v. *Durga Dei* (1900), 22 All. 382; *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (1904), 27 Mad. 588. See *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (1906), 29 Mad. 390.

[9] *Venkatanarayana Pillai* v. *Subbammal* (1915), 42 I. A. 125; 38 Mad. 406; 19 C. W. N. 641; 17 Bom. L. R. 468; differing from *China Veerayya* v. *Lakshminarasamma* (1912), 38 Mad. 406; *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (1904), 27 Mad. 588; *Muthusami Mudaliyar* v. *Masilamani* (1910), 33 Mad. 342.

[10] *Ante*, p. 501.

of the restricted estate,[1] or are precluded from suing by consent to the alienation,[2] waiver,[3] limitation or otherwise,[4] or where the immediate reversioner has waived all rights in the reversion,[5] or refuses without sufficient cause to sue,[6] but under no other circumstances.[7]

Where the next immediate reversioner will, if she succeeds to the property, be a restricted owner, the Calcutta [8] and Madras [9] High Courts have held that the reversioner next in succession may sue. This is, it is submitted, the correct view. The Allahabad High Court is not agreed on this subject, one view being that the next reversioner can only so sue in case of collusion or connivance.[10]

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[1] See *Naikram Lall* v. *Soorujbuns Sahee*, Ben. S. D. A. 1859, p. 891.

[2] *Bakhtawar* v. *Bhagwana* (1910), 32 All. 76. *Ante*, pp. 486–489.

[3] *Bhikaji Apaji* v. *Jagannath Vithal* (1873), 10 Bom. H. C. 351; approved of in *Anund Koer (Rani)* v. *Court of Wards* (1880), 8 I. A. 14, at p. 22; 6 Calc. 764, at p. 772; 8 C. L. R. 381, at p. 385; *Ammur Singh* v. *Murdun Singh* (1870), 2 N. W. P. 31.

[4] *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25; *Govinda Pillai* v. *Thayammal* (1904), 28 Mad. 7; *Jhula* v. *Kanta Prasad* (1887), 9 All. 441; *Madari* v. *Malki* (1884), 6 All. 428; *Raghunath* v. *Thakuri* (1881), 4 All. 16; *Gauri Dut* v. *Gur Sahai* (1878), 2 All. 41; *Dowar Rai* v. *Boonda (Mussumat)* (1866), N. W. P. F. B. R. 56; *Shama Soonduree Chowdhrain* v. *Jumoona Chowdhrain* (1875), 24 W. R. C. R. 86; *Retoo Raj Pandey* v. *Lalljee Pandey* (1875), 24 W. R. C. R. 399; *Bama Soonduree Dossee* v. *Bama Soonduree Dossee* (1868), 10 W. R. C. R. 301. The subsequent reversioner is not entitled to wait until a suit by the immediate reversioner is barred by limitation; *Kunwar Bahadoor* v. *Bindraban* (1914), 37 All. 195.

[5] *Ammur Singh* v. *Murdun Singh* (1870), 2 N. W. P. 31. In *Rai Charan Pal* v. *Pyari Mani Dasi* (1869), 3 B. L. R. O. C. 70, where the immediate reversioner had assigned his interests to the next reversioner, the Court declined to permit a suit by the assignee.

[6] *Jhula* v. *Kanta Prasad* (1887), 9 All. 441; *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 2513.

[7] *Meghu Rai* v. *Ram Khelawan Rai* (1913), 35 All. 326; *Jhandhu* v. *Tariff* (1914), 37 All. 45; 19 C. W. N. 197; 17 Bom. L. R. 44; following *Anund Koer (Rani)* v. *Court of Wards* (1880), 8 I. A. 14; 6 Calc. 764; 8 C. L. R. 381.

[8] *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25, differing from *Ishwar Narain* v. *Janki* (1893), 15 All. 132; *Chunder Koomar Hazaree* v. *Dwarkanath Purdhan*, Ben. S. D. A. 1859, p. 1623, and earlier cases cited in *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62, at p. 67; 9 C. W. N. 25, at p. 28; *Bal Gobind Ram* v. *Hirusranee* (1865), 2 W. R. C. R. 255; *contrà Bama Soonduree Dossee* v. *Bama Soonduree Dossee* (1868), 10 W. R. C. R. 301, in which the earlier cases were not referred to.

[9] *Kandasami* v. *Akkammal* (1889), 13 Mad. 195; *Raghupati* v. *Tirumalai* (1892), 15 Mad. 422; *Chidambara Reddiar* v. *Nallammal* (1909), 33 Mad. 410.

[10] *Ishwar Narain* v. *Janki* (1893), 15 All. 132, agreeing with *Madari* v. *Malki* (1884), 6 All. 428, and differing from *Balgobind* v. *Ramkumar*

"Their lordships are of opinion that although a suit of this nature [1] may be brought by a contingent reversionary heir, yet that as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal* [2] is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their lordships' opinion, be limited. If the nearest reversionary heir refuses without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable heir would be entitled to sue: see *Goolab Sing* (*Kooer*) v. *Kurun Sing* (*Rao*).[3] In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit." [4]

Mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless Hindu widow, cannot be understood to amount to acquiescence in the sale. The acquiescence which would entitle a more remote reversioner to maintain the suit must be such as would amount to an equitable estoppel, precluding the first reversioner from contesting the validity of the sale made by the widow.[5]

Although the right of the nearest reversioner to maintain a declaratory suit may be barred by the law of limitation, the rights of subsequent reversioners are not thereby barred.[6] Limitation.

(1884), 6 All. 431. See *Radha Kishen* v. *Bakhtawur Lall* (1866), 1 Agra, 1. The latest decision (*Raja Dei* v. *Umed Singh* (1912), 34 All. 207) is in favour of the right to sue.

[1] *I.e.* to set aside an adoption. The principle will apply to other acts of the widow which injure the interests of the reversion.

[2] (1873) 10 Bom. H. C. 351; *ante*, p. 506.

[3] (1871) 14 M. I. A. 176, at p. 193; 10 B. L. R. 1, at p. 8. These remarks cover the case where the nearest reversionary heir is a female who supports the alienation in question, and the nearest reversionary heir presumptively entitled to the full ownership of the property is the person in whose favour the transfer complained of was made: *Raja Dei* v. *Umed Singh* (1912), 34 All. 207, at p. 210.

[4] *Anund Korer* (*Rani*) v. *Court of Wards* (1880), 8 I. A. 14, at pp. 22, 23; 6 Calc. 764, at pp. 772, 773; 8 C. L. R. 381, at pp. 385, 386.

[5] *Balgobind* v. *Ramkumar* (1884), 6 All. 431, at p. 434; *Duleep Singh* v. *Sree Kishoon Panday* (1872), 4 N. W. P. 83.

[6] *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25; *contrà Jamnabai* v. *Dharsey* (1902), 4 Bom. L. R. 893. See *Mesraw* (*Musst*) v. *Girjanundan Tewari* (1908), 12 C. W. N. 857, at p. 859. See *ante*, p. 500.

A subsequent reversioner would be bound to bring his suit within six years from the time when his right to sue occurred.[1]

A minor who is suing to declare an alienation invalid can obtain the advantage of s. 6 of the Limitation Act,[2] although the right of previous reversioners be barred.[3]

Reversioner can dispute acts derogatory to succession.

At any rate where the widow or other restricted female owner omits to take proper steps to safeguard the estate, the immediate reversioner,[4] and apparently where he neglects to do so, or is precluded from doing so, a subsequent reversioner can dispute any act derogatory to his succession, which he could have disputed if the property had been vested in him.

For instance, he may dispute the will of the last male owner, or an act of a person in whom the property had previously been vested.[5]

It has been held that a person entitled to an estate in reversion expectant on the death of a Hindu widow is entitled to bring a suit for administration of the estate of her husband.[6]

Falling in of reversion.

On the death of the restricted heir, the then next heir of the last full owner is entitled to the property.[7]

As to his right to apply for a succession certificate, see *Abinas Chandra Paul* v. *Probodh Chandra Paul* (1911), 15 C. W. N. 1018.

If the immediate reversioner disclaims, the next subsequent reversioner would be entitled to the property.[8]

The reversioner who becomes the owner is entitled to dispute all unauthorized acts of the restricted owner.[9]

He is entitled to recover the property in the state in which it was at the death of the restricted owner.[10]

As to the liability for any improvements made by an alienee holding under an unauthorized act of the widow, see *post*, p. 513.

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[1] Limitation Acts, IX. of 1908, Sched. I. art. 120; XV. of 1877, Sched. II. art. 120; *Chooramani Dasi* v. *Baidya Nath Naik* (1904), 32 Calc. 473.

[2] Act IX. of 1908; Act XV. of 1877, s. 7.

[3] *Govinda Pillai* v. *Thayammal* (1904), 28 Mad. 57. See *Bhagwanta* v. *Sukhi* (1899), 22 All. 33; *Abinash Chandra Mazumdar* v. *Harinath Shaha* (1904), 32 Calc. 62; 9 C. W. N. 25.

[4] *Rojomoyee Dasse* v. *Troyluck Mohiney Dassee* (1901), 29 Calc. 260; 6 C. W. N. 267. See *Sant Kumar* v. *Deo Saran* (1886), 8 All. 365. See, however, *Ishwar Narain* v. *Janki* (1893), 15 All. 132.

[5] *Bykunt Nath Roy* v. *Grish Chunder Mookerjee* (1871), 15 W. R. C. R. 96; *Bheem Ram Chuckerbutty* v. *Huree Kishore Roy* (1864), 1 W. R. C. R. 359.

[6] *Rojomoyee Dassee* v. *Troyluckho Mohiney Dassee* (1901), 29 Calc. 260; 6 C. W. N. 267.

[7] *Ante*, p. 367.

[8] *Gooshaeen Teekumjee* v. *Pursotum Lalljee* (1868), 3 Agra, 238; *Ladooiah (Mussumat)* v. *Sanvaley* (1868), *ibid.* 191.

[9] *Ante*, p. 501.

[10] *Vrijbhukandas Dwarkadas* v. *Dayaram Jadavji* (1907), 32 Bom. 32; 9 Bom. L. R. 1181.

A suit by a Hindu entitled to the possession of immovable property on the death of a Hindu female,[1] or by a person to whom, after the death of the female, he has assigned the property, may be brought within twelve years from the death of such female, even though the property has passed into other hands by her alienation, or is held adversely to her.[2] Limitation.

This applies to a suit brought by a female reversioner [3] and to a suit brought by a person who is entitled to the reversion after the property has been held by two females in succession.[4]

The cause of action by a reversioner for possession commences at the death of the widow, whether there has been in name or effect an alienation for her life.[5]

The right of reversioners after the death of the restricted heir is not affected by possession held adversely to the widow, as their right does not accrue until after her death.[6]

Where there has been an alleged adoption, which is disputed, the reversioner has the same time within which he can sue for possession.[7]

Adverse possession by widow.

If the widow held not as a Hindu widow, but under an independent and adverse title, the reversioners are barred by such hostile possession for twelve years.[8]

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[1] Limitation Act IX. of 1908, Sched. I. art. 141; Act XV. of 1877, Sched. II. art. 141; *Runchordas Vandrawandas* v. *Parvatibhai* (1899), 26 I. A. 71; 23 Bom. 725; 3 C. W. N. 621; 1 Bom. L. R. 607; S. C. in Courts below (1897), 21 Bom. 646; (1889) 14 Bom. 482; *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi (Srimati)* (1907), 34 I. A. 87; 34 Calc. 329; 11 C. W. N. 424; 9 Bom. L. R. 602; *Harihar Ojha* v. *Dasarathi Misra* (1905), 33 Cal. 257; 9 C. W. N. 636; *Rakhmabai* v. *Keshav Raghunath Bhise* (1906), 31 Bom. 1; *Mukta* v. *Dada* (1893), 18 Bom. 216; *Cursandas Govindji* v. *Vundravandas Purshotam* (1889), 14 Bom. 482, at p. 488; *Mesraw (Musst)* v. *Girjanundan Tewari* (1908), 12 C. W. N. 857; *Srinath Kur* v. *Prosunno Kumar Ghose* (1883), 9 Calc. 934; 13 C. L. R. 372; *Pursut Koer* v. *Palut Roy* (1881), 8 Calc. 442; *Ram Dei Kunwar* v. *Abu Jafar* (1905), 27 All. 494; *Hanuman Prasad Singh* v. *Bhagauti Prasad* (1897), 19 All. 357; *Ram Kali* v. *Kedarnath* (1892), 14 All. 156; *Jhamman Kunwar* v. *Tiloki* (1903), 25 All. 435, and *Amrit Dhar* v. *Bindesri Prasad* (1901), 23 All. 448, differing from *Tikaram* v. *Shama Charan* (1897), 20 All. 42; *Sreeramulu* v. *Kristamma* (1902), 26 Mad. 143, at p. 147.

[2] *Gadadhar Roy* v. *Hari Krishna Sarkar* (1904), 8 C. W. N. 535. This will only apply to an assignment after the death of the widow, *ante*, p. 500.

[3] *Ram Dei Kunwar* v. *Abu Jafar* (1905), 27 All. 494.

[4] *Jhamman Kunwar* v. *Tiloki* (1903), 25 All. 435; *Sambasiva* v. *Ragava* (1890), 13 Mad. 512. See, however, *Chhaganram Astikram* v. *Motigavri (Bai)* (1890), 14 Bom. 512.

[5] *Hanuman Prasad Singh* v. *Bhagauti Prasad* (1897), 19 All. 357; *Ram Shewuk Roy* v. *Sheo Gobind Sahoo* (1867), 8 W. R. C. R. 519.

[6] See *Ram Kali* v. *Kedarnath* (1892), 14 All. 156; *Sheoraji* v. *Ramjas Pande* (1911), 33 All. 430. As to the old law, see *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1868), B. L. R. F. B. R. 1008; 9 W. R. C. R. 505.

[7] *Bhagwat Pershad* v. *Murari Lal* (1910), 15 C. W. N. 524.

[8] *Shamkoer* v. *Dah Koer* (1902), 29 I. A. 132; 29 Calc. 664; 6 C. W. N.

Where there is a dispute on the subject, the fact of the death of the widow must be proved by the reversioners.[1]

Proof in suit in which alienation is in question.

In a suit in which an alienation by a restricted female owner is in question, the alienee must either prove the necessity, or that he made *bonâ fide* inquiries as to it, and satisfied himself as a reasonable man as to its existence.[2] He is not, if he so inquires and acts honestly, affected by the precedent mismanagement of the estate,[3] or by the fact that the necessity was created by the action of the widow. If he made such inquiries, he need not see that the money he advances is applied to meet the necessity,[4] nor is he bound to ascertain that the whole money so advanced is actually required therefor.[5]

The purchaser or mortgagee must in a case of dispute prove that the woman executed the deed with full knowledge of her rights, of all the circumstances, and of the consequences [6] and of the nature of the alienation

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657; 4 Bom. L. R. 547; *Lachhan Kunwar (Mussummat)* v. *Anant Singh* (1894), 22 I. A. 25; 22 Calc. 445, as explained in *Jhamman Kuar* v. *Tiloki* (1903), 25 All. 435, and in *Amrit Dhar* v. *Bindesri Prasad* (1901), 23 All. 448; *Mahabir Pershad* v. *Adhikari Koer* (1896), 23 Calc. 942; *Gajadhar Pande* v. *Parbati* (1910), 33 All. 312. See *Babu* v. *Bhikaji* (1889), 14 Bom. 317. See *Ganpatrao Moroji* v. *Vamanrao Shamrao* (1908), 10 Bom. L. R. 216, where the widow was given an absolute title by arrangement with the reversioners.

[1] *Walihan (Mussummat)* v. *Jogeshwar Narayan* (1907), 35 I. A. 38; 35 Calc. 189; 12 C. W. N. 227; 10 Bom. L. R. 9.

[2] *Dharam Chand Lal* v. *Bhawani Misrain* (1897), 24 I. A. 183; 25 Calc. 189; 1 C. W. N. 697; *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 266; *Banga Chandra Dhur Biswas* v. *Jagatkishore Acharjya Chowdhuri* (1916), 43 I. A. 249; 44 Calc 186; 21 C. W. N. 225; 18 Bom. L. R. 368; *Birj Lal (Lala)* v. *Inda Kunwar* (1914), 36 All. 187; 18 C. W. N. 652; 16 Bom. L. R. 352; *Manokarani Debi (Srimutty)* v. *Haripada Mitter* (1914), 18 C. W. N. 718; *Byjnath Pershad (Lalla)* v. *Bissen Beharee Sahoy Singh* (1873), 19 W. R. C. R. 79; *Amarnath Sah (Lala)* v. *Achan Kuar (Rani)* (1892), 19 I. A. 196; 14 All. 436; *Bhimaraddi* v. *Bhaskar* (1904), 6 Bom. L. R. 628. See *ante*, pp. 293, 294. In *Janhabi (Mussit)* v. *Balbhadra Suar* (1911), 15 C. W. N. 793, the Court held that mere inquiries from the widow were insufficient.

[3] *Hunooman Persaud Panday* v. *Munraj Koonweree (Mussumat Babooee)* (1856), 6 M. I. A. 393; 18 W. R. C. R. note to p. 81; *Mata Pershad* v. *Bhageeruthee* (1870), 2 N. W. P. 78; *Sreenath Roy* v. *Ruttunmalla Chowdhrain*, Ben. S. D. A., 1859, p. 421.

[4] *Hunooman Persaud Panday* v. *Munraj Koonweree (Mussumat Babooee)* (1856), 6 M. I. A. 393; 18 W. R. C. R. note to p. 81; *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547; *Ram Pershad Sing* v. *Nagbungshee Kooer (Mussamut)* (1868), 9 W. R. C. R. 501.

[5] *Ghansham Singh* v. *Badiya Lal* (1902), 24 All. 547.

[6] See *Kameswar Persaud (Baboo)* v. *Run Bahadoor Singh* (1880), 8 I. A. 8; 6 Calc. 843; 8 C. L. R. 361; *Ramratan Sukal* v. *Nandu (Mussumat)* (1891), 19 I. A. 1; 19 Calc. 249; *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450. As to presumption of knowledge of contents of document, see *Bhuban*

she was making, and that such alienation was justified by necessity, or that he did all that was reasonable to satisfy himself of the existence [1] and extent [2] of the necessity.

Purdah-nashin. Apart from any question of necessity, it is clear that a *purdahnashin* lady is not bound by an alienation unless it be distinctly proved that she was aware of all the circumstances and of the nature and effect of the transaction,[3] and that no advantage was taken of her position.[4]

Although in many cases the Court has required evidence that the lady had an independent adviser, independent advice is not always necessary.[5] "Advice is merely a means to secure that which is essential, an intelligent apprehension of the transaction." [6]

As to evidence of the execution of a document behind a *purdah*, see *Padarath* v. *Ram Narain Upadhia* (*Pandit*) (1915), 42 I. A. 163; 37 All. 474; 19 C. W. N. 991; 17 Bom. L. R. 617; *Rukmini Koeri* (*Musst*) v. *Nilmani Bandyopadhya* (1915), 19 C. W. N. 1309.

The burden is upon the purchaser to aver and prove that she sold the property under such special circumstances as justify a Hindu widow in alienating the immovable property of her husband without the consent of his heirs.[7]

General evidence to the effect that the husband died in debt, and that his widow had substituted new securities at reduced interest for old ones, does not exempt the person upholding the transaction from proving that the particular transaction in question was justified, nor does it throw on the other side the onus of proving the solvency of the husband's estate.[8]

Mohini Dasi v. *Gajalakshmi Debi* (1915), 19 C. W. N. 1330.

[1] *Bhagwat Dayal Singh* (*Raja Rai*) v. *Debi Dayal Sahu* (1908), 35 I. A. 48; 35 Calc. 420; 12 C. W. N. 393.

[2] *Lalit Panday* v. *Sridhar Deo Narayan Sing* (1870), 5 B. L. R. 176.

[3] *Kali Baksh Singh* v. *Ram Gopal Singh* (1913), 41 I. A. 23; 36 All. 81; 18 C. W. N. 282; 16 Bom. L. R. 147.

[4] *Keshub Lall Pyne* v. *Radha Raman Nundy* (1912), 17 C. W. N. 991; at p. 995.

[5] See *Sudisht Lal* v. *Sheobarat Koer* (*Mussummat*) (1881), 8 I. A. 39; 7 Calc. 245; *Tika Ram* v. *Deputy Commissioner of Bara Banki* (1899), 26 I. A. 97; 26 Calc. 707; 3 C. W. N. 573; 1 Bom. L. R. 692; *Sham Koer* v. *Dah Koer* (1902), 29 I. A. 132; 29 Calc. 664; 6 C. W. N. 657; 4 Bom. L. R. 547; *Bhagwat Dayal Singh* (*Raja Rai*) v. *Debi Dayal Sahu* (1908), 35 I. A. 48; 35 Calc. 420; 12 C. W. N. 393; 10 Bom. L. R. 230; *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (1906), 31 Bom. 165; *Narbadabai* v. *Mahadeo Narayan* (1880), 5 Bom. 99, at p. 107; *Achhan Kuar* v. *Thakur Das* (1895), 17 All. 125; *Sajjad Husain* (*Mirza*) v. *Wazir Ali Khan* (*Nawab*) (1912), 39 I. A. 156; 34 All. 455; 14 Bom. L. R. 1055, and cases cited in Ameer Ali and Woodroffe's Indian Evidence Act, note to s. 111. As to the attestation of documents executed by *purdahnashins*, see *Sarur Jigar Begum* v. *Barada Kanta Mitter* (1910), 37 Calc. 526; 14 C. W. N. 974.

[6] See *Kamini Dasee* v. *Krishnachandra Mukerjee* (1912), 39 Calc. 933; 16 C. W. N. 649; *Badiatanessa Bibee* v. *Ambika Charan Ghose* (1914), 18 C. W. N. 1133. In *Mohabir Prosad* (*Lala*) v. *Taj Begum* (*Mussamat*), 19 C. W. N. 162; the Court declined to uphold a mortgage in favour of the legal adviser of the lady. As to the duty of persons standing in a fiduciary relationship to the lady, see *Sri Kishan Lal* v. *Kashmiro* (*Mussammat*) (1916), 31 Mad. L. J. 362.

[7] *Gurunath Nilkanth* v. *Krishnaji Govind* (1880), 4 Bom. 462.

[8] *Maheshar Baksh Singh* v. *Ratan Singh* (1896), 23 I. A. 57; 23 Calc. 266. See *Tayammaul* v. *Sashachalla Naiker* (1865), 10 M. I. A. 429, at p. 433.

Lapse of time does not affect the question of onus of proof, except in so far as it may give rise to a presumption of acquiescence or save the alienee from adverse inferences, arising from the scanty proof which may be offered.[1]

As to the effect of a recital of the necessity, see *ante*, p. 296.

Where portion only of necessity proved.

Where a portion only of the justifying necessity is proved, and the alienee knew, or might, if he made proper inquiries, have known that a less amount than the amount paid by him was required to meet the necessity, the estate may be charged with the lesser amount,[2] and may be released on payment thereof,[3] or the sale may be set aside on payment of the amount due with interest, mesne profits being set off in case the alienee has had possession;[4] or possession may be conditional on the repayment.[5]

It was said in one case:[6] "It has been held by the Privy Council in the case of *Deputy Commissioner of Kheri* v. *Khanjan Singh*[7] that where a sale by a widow is partially invalid owing to absence of legal necessity, the whole sale must be set aside, the purchaser accounting for the mesne profits, and the sums expended for legal necessity being set off against them." The Judicial Committee laid down no such general proposition in that case. In another case,[8] it was said: "It would manifestly be impossible, and possibly prejudicial to the interest of the estate, if the widow were to be held to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor, and we are of opinion that the Privy Council did not intend to lay down any such rule." On the question as to whether an alienation should be entirely set aside, should not the test be: having regard to the fact that there was some necessity, was the transaction a proper one and

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[1] *Ravaneshwur Prasad Singh* v. *Chandi Prasad Singh* (1911), 38 Calc. 721; upheld on appeal (1915), 43 Calc. 417.

[2] See *Kamikhaprasad Roy* v. *Jagadamba Dasi (Srimati)* (1870), 5 B. L. R. 508; *Gobind Singh* v. *Baldeo Singh* (1903), 25 All. 330; *Thakurmani Singh* v. *Dai Rani Koeri* (1906), 33 Calc. 1079; *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474; 9 Bom. L. R. 591; *Lalit Panday* v. *Sridhar Deo Narayan Sing* (1870), 5 B. L. R. 176; 13 W. R. C. R. 457; *Paparayudu* v. *Rattamma* (1912), 37 Mad. 275.

[3] *Ram Dei Kunwar* v. *Abu Jafar* (1905), 27 All. 494; *Phool Chund Lall* v. *Rughoobuns Suhaye* (1868), 9 W. R. C. R. 107, followed in *Sugeeram Begum* v. *Juddoobuns Suhaye* (1868), 9 W. R. C. R. 284.

[4] See *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474; 9 Bom. L. R. 591.

[5] *Bhagwat Dayal Singh (Raja Rai)* v. *Debi Dayal Sahu* (1908), 35 I. A. 48; 35 Calc. 420; 12 C. W. N. 393; 10 Bom. L. R. 230.

[6] *Hari Kissen Bhagat* v. *Bajrang Sahai Singh* (1909), 13 C. W. N. 544, at p. 549.

[7] (1907), 34 I. A. 72; 29 All. 331; 11 C. W. N. 474; 9 Bom. L. R. 591.

[8] *Felaram Roy* v. *Bagalanand Banerjee* (1910), 14 C. W. N. 895, at p. 896.

for the benefit of the estate ? [1] Otherwise, if the alienation be set aside altogether, a *bonâ fide* alienee might lose his money and have no security.

There is authority that a suit to set aside a sale, where the necessity for the whole of the purchase money was not proved, cannot be successful unless the plaintiff offers in his plaint to pay the sum due; [2] but other authority, which is, it is submitted, preferable, shows that no such offer is necessary.[3]

Equities on setting aside alienation.

Where an alienation is set aside, the reversioner may sometimes be required to pay the amount, to the extent of which the estate has derived benefit.

Where the widow raises money to pay off a mortgage, although she has funds sufficient for the purpose the reversioner is not entitled to set aside the sale except upon the terms of paying off the mortgage.[4]

Where the widow borrows money for the purpose of increasing her husband's estate by purchase of other property, the reversioners, if claiming the acquisition, must satisfy the debt.[5]

Where the purchaser has to the knowledge of the reversioner, and without any protest from him,[6] or if he believed in good faith that he had an absolute title,[7] laid out sums for the improvement and benefit of the property, the reversioner, on obtaining the reversal of the sale, may be required to compensate the purchaser,[8] but the purchaser cannot claim money spent on repairs, or the right to remove any building which he may have erected.[9]

Pending suits.

On the death of the restricted owner the reversioner takes her place in suits pending by or against her on account of the estate,[10] and can execute decrees obtained by her in such suits.[11]

If the *stridhan* heir of the widow is erroneously substituted in the proceedings the reversioner is not bound.[12]

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[1] See *Phool Chund Lall* v. *Rughoobuns Suhaye* (1868), 9 W. R. C. R. 107; see *ante*, p. 485.

[2] *Singam Setti Sanjivi Kondaya* v. *Draupadi Bayamma* (1907), 31 Mad. 153; *Mutteeram Kowar* v. *Gopaul Sahoo* (1873), 11 B. L. R. 416; 20 W. R. C. R. 187. See *Phool Chund Lall* v. *Rughoobuns Suhaye* (1868), 9 W. R. C. R. 107, at p. 109.

[3] *Paparoyadu* v. *Rattamana* (1912), 37 Mad. 275.

[4] See *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7; 14 B. L. R. 226; 22 W. R. C. R. 409; *Sadashiv Bhaskar Joshi* v. *Dhakubai* (1880), 5 Bom. 450.

[5] *Oodey Singh (Kooer)* v. *Phool Chund* (1873), 5 N. W. P. 197; *Shewak Ram (Rai)* v. *Bhowani Buksh Singh* (1880), 6 C. L. R. 140.

[6] See *Dattaji Sakharam Rajadhiksh* v. *Kalba Yese Parabha* (1896), 21 Bom. 749.

[7] Transfer of Property Act (IV. of 1882), s. 51; *Abhoy Churn Ghose* v. *Attarmoni Dassee* (1908), 13 C. W. N. 931.

[8] *Kedar Nath* v. *Matha Mal* (1913), 40 Calc. 555; 17 C. W. N. 797; 15 Bom. L. R. 467. See *ante*, p. 307.

[9] *Vrijbhukandas* v. *Dayaram* (1907), 32 Bom. 32; 9 Bom. L. R. 1181.

[10] *Rikhai Rai* v. *Sheo Pujan Singh* (1910), 33 All. 15; *Premmoyi Choudhrani* v. *Preonath Dhur* (1896), 23 Calc. 636; *Jadubansi Kunwar* v. *Mahpal Singh* (1915), 38 All. 111. See *Chintamony Dutt* v. *Mohesh Chundra Banerjee* (1896), 23 Calc. 454.

[11] *Mahadeo Singh* v. *Sheokaran Singh* (1913), 35 All. 481.

[12] *Kailash Chandra Bose* v. *Girija Sundari Debi* (1912), 39 Calc. 925; 16 C. W. N. 658.

Rights of Crown.

When there are no heirs of the last full owner the Crown, as ultimate heir, can (it is submitted, during the woman's lifetime or thereafter) impeach the unauthorized act of a restricted female owner,[1] and has, it is submitted, all such other rights as may be possessed by a reversioner.

Except a reversioner or a person who has purchased at an execution sale, which disposed of the whole interest in the property,[2] no one else is entitled to dispute the acts of a restricted owner.[3]

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[1] *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1861), 8 M. I. A. 529; 2 W. R. P. C. 61.

[2] *Rajkishen Sircar* v. *Jaheeroorul Huq* (*Chowdhry*) W. R. 1864, C. R. 351.

[3] *Deonandan Pershad* v. *Udit Narain Singh* (1914), 18 C. W. N. 940. See *Brojokishoree Dassee* v. *Sreenath Bose* (1868), 9 W. R. C. R. 463.

CHAPTER XVII.

INHERITANCE TO PRIVATE IMPARTIBLE PROPERTY.

THE succession to property which is impartible in the sense that it descends to a single heir [1] depends upon custom,[2] or on the terms of the grant by Government.[3]

Inheritance to impartible estate.

"The question whether an estate is subject to the ordinary Hindu law succession, or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it." [4]

"The acceptance of a *sanad* in the common form under Madras Regulation XXV. of 1802, does not of itself, and apart from other circumstances, avail to alter the succession to an hereditary estate." [5]

The burden of proof is upon the person asserting that the ordinary Hindu law of inheritance does not apply.[6]

Principles of inheritance.

"When inheritance is impartible it is enjoyed in a different

[1] See *ante*, pp. 259–262.

[2] As to custom, see *ante*, pp. 27–32.

[3] See *Venkata Narasimha Appa Row* (*Rajah*) v. *Court of Wards*, 7 I. A. 38; 6 C. L. R. 153; *Ramnad Case* (1893), 24 Mad. 613, and cases below, note 5. As to a grant by the East India Company in 1771, see *Ram Nundun Singh* v. *Janki Koer* (*Maharani*) (1902), 29 I. A. 178; 29 Calc. 828; 7 C. W. N. 57; 4 Bom. L. R. 664.

[4] *Malikarjuna* (*Srimantu Rajah Yarlagadda*) v. *Durga* (*Srimantu Rajah Yarlagadda*) (1890), 17 I. A. 134, at p. 144; 13 Mad. 406, at p. 423; *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261, at p. 269; 28 Mad. 508, at p. 515; 10 C. W. N. 95, at p. 106; 7 Bom. L. R. 907; *Venkata Narasimha Appa Row* (*Sri Raja*) v. *Parthasarathy* (*Sri Raja*) (1913), 41 I. A. 51, at p. 61; 37 Mad. 199, at p. 209; 17 C. W. N. 1221, at p. 1224; 15 Bom. L. R. 1010, at p. 1014; *Durga Charan Mahto* v. *Raghunath Mahto* (1913), 18 C. W. N. 55.

[5] *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261, at p. 269; 28 Mad. 508, at p. 515; 10 C. W. N. 95, at p. 106; 7 Bom. L. R. 907; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (1881), 8 I. A. 99; 3 Mad. 290; *Malikarjuna* (*Srimantu Rajah Yarlagadda*) v. *Durga* (*Srimantu Rajah Yarlagadda*) (1890), 17 I. A. 134; 13 Mad. 406; *Venkata Narasimha Appa Row* (*Rajah*) v. *Court of Wards* (1879), 7 I. A. 38; 6 C. L. R. 153; *Collector of Trichinopoly* v. *Lekkamani* (1874), 1 I. A. 282; 14 B. L. R. 115.

[6] See *Venkata Narasimha Appa Row* (*Sri Raja*) v. *Parthasarathy* (*Sri Raja*) (1913), 41 I. A. 51, at p. 61; 37 Mad. 199, at p. 209; 17 C. W. N. 1221, at p. 1224; 15 Bom. L. R. 1010, at p. 1014; *Durga Charan Mahto* v. *Raghunath Mahto* (1913), 18 C. W. N. 55. See *ante*, p. 32.

Separate acquisition.

Where the impartible estate is a separate acquisition,[1] the law of the succession to separate acquisitions applies, and a woman can succeed as in the case of partible property.[2]

"There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Shivagunga* case,[3] and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females." [4]

Thus in default of male issue the widow succeeds.[5] As to the case where there is more than one widow, see *ante*, p. 387.

As to the daughters' sons, see *ante*, p. 390.

Nearest coparcener of senior line.

When ancestral impartible property governed by the Mitakshara law passes from one line to another, it devolves, not on the coparcener nearest in blood, but on the nearest coparcener of the senior line.[6]

Primogeniture.

If there be no indication to the contrary, the property descends according to the rule of primogeniture,[7] *i.e.* as between persons of the same class the elder would be entitled to succeed.[8]

In some cases another ground of selection and not primogeniture is the governing rule of the family.[9]

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[1] As where there is a grant from the Government independently of the family. See *Ram Nundun Singh* v. *Janki Koer* (1902), 29 I. A. 178; 29 Calc. 828; 7 C. W. N. 57; 4 Bom. L. R. 644.

[2] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543; 2 W. R. P. C. 31; *Ram Nundun Singh* v. *Janki Koer* (*Maharani*) (1902), 29 I. A. 178; 29 Calc. 828; 7 C. W. N. 57; 4 Bom. L. R. 644.

[3] *Katama Natchiar* v. *Rajah of Shivagunga* (1863), 9 M. I. A. 543; 2 W. R. P. C. 31.

[4] *Ram Nundun Singh* v. *Janki Koer* (*Maharani*) (1902), 29 I. A. 178, at p. 194; 29 Calc. 828, at p. 852; 7 C. W. N. 57, at p. 73; 4 Bom. L. R. 664.

[5] *Periasami* v. *Periasami* (1878), 5 I. A. 61; 1 Mad. 312; 2 C. L. R. 81; *Doorga Persad Singh* (*Tekait*) v. *Doorga Konwari* (*Tekaitni*) (1878), 5 I. A. 149, at p. 160; 4 Calc. 190, at p. 202; 3 C. L. R. 32, at p. 40.

[6] *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (1905), 32 I. A. 261; 28 Mad. 508; 10 C. W. N. 95; 7 Bom. L. R. 907, approving of *Naraganti* v. *Venkatachalapati* (1881), 4 Mad. 250; *Muttuvaduganatha Tevar* v. *Periasami* (1892), 16 Mad. 11, at p. 16, affirmed on appeal (1896), 23 I. A. 128; 19 Mad. 451. See *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1883), 11 I. A. 51; 10 Calc. 511; *Narindar Bahadur Singh* v. *Achal Ram* (1893), 20 I. A. 77; 20 Calc. 649; *Baijnath Prasad Singh* v. *Tej Bali Singh* (1916), 38 All. 591.

[7] *Ishri Singh* (*Thakur*) v. *Baldeo Singh* (1884), 11 I. A. 135, at p. 145; 10 Calc. 792, at p. 805; *Bhawani Ghulam* v. *Deo Raj Kuari* (1883), 5 All. 542.

[8] *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316, at p. 325.

[9] *Ishri Singh* (*Thakur*) v. *Baldeo Singh* (1884), 11 I. A. 135; 10 Calc. 792; *Achal Ram* v. *Udai Partab Addiya Dat Singh* (1883), 11 I. A. 51; 10 Calc. 51; *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459;

As to Oudh taluqdars, see *Debi Baksh Singh* v. *Chandrabhan Singh* (1910), 37 I. A. 168; 32 All. 599; 14 C. W. N. 1010; 12 Bom. L. R. 1015.

Nearness of blood is no ground of preference under the Mitakshara law amongst members of the same class.

Nearness of blood.

Thus an elder brother of the half blood would be preferred to a younger brother of the whole blood.[1]

In a case governed by the Bengal school of law the heir will be the eldest member of the class of persons who are nearer of kin to the late owner than any other class.[2]

Bengal school.

Thus a brother of the whole blood would be preferred to an elder brother of the half blood.[3]

In the absence of a custom that sons take in accordance with the seniority of their mothers,[4] the eldest son of the deceased born of any one of his wives succeeds.[5]

Sons.

The question of the caste of the mother in the absence of a custom to the contrary [6] does not apparently make any difference.[7]

On the death of such eldest son after the property has vested in him, the estate would pass in his line.[8]

It seems unsettled whether when an eldest son has died, before the

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4 Bom. L. R. 372. As to other customs, see *Nittanund Murdiraj* v. *Sreekurun Juggernath Bewartah Patnaick* (1865), 3 W. R. C. R. 116.

[1] *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316.

[2] Mayne's "Hindu Law," 8th ed., p. 767.

[3] *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1869), 12 M. I. A. 523; 3 B. L. R. P. C. 13; 12 W. R. P. C. 21. See *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (1894), 17 Mad. 316, at p. 330.

[4] *Ramasami Kamaya Naik* v. *Sundaralingasami Kamaya Naik* (1894), 17 Mad. 422; affirmed on appeal, *Sundaralingasawmi Kamaya Naik* v. *Ramasawmi Kamaya Naik* (1899), 26 I. A. 55; 22 Mad. 515; 1 Bom. L. R. 850.

[5] *Jagdish Bahadur* v. *Sheo Partab Singh* (1901), 28 I. A. 100; 23 All. 369; 5 C. W. N. 602; 3 Bom. L. R. 298; *Rughonath Singh (Rajah)* v. *Hurreehur Singh (Rajah)* (1843), 7 Ben. Sel. R. 126 (new edition, 146); *Bhujangrav* v. *Malojirav* (1868), 5 Bom. H. C. A. C. 161; *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1872), 14 M. I. A. 570; I. A. Sup. Vol. 1; 12 B. L. R. 396; 17 W. R. C. R. 553; *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru* (1880), 8 I. A. 1; 2 Mad. 286; 8 C. L. R. 315; *Radaik Ghaserain* v. *Budaik Pershad Sing* (1863), Marsh. 644.

[6] *Bistooprea Patmohadea (Ranee)* v. *Basoodeb Dull Bewartee Patnaik* (1865), 2 W. R. C. R. 232.

[7] Mayne's "Hindu Law," 8th ed., pp. 756–758.

[8] Mayne's "Hindu Law," 8th ed., p. 759. This was held to be the custom of the family in *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1902), 29 I. A. 62; 29 Calc. 343; 6 C. W. N. 459; 4 Bom. L. R. 372.

estate has become vested in him, his eldest son takes in preference to his brothers.[1]

An illegitimate son of the father of the deceased may succeed in preference to some remote relation.[2]

As to an illegitimate son, see *ante*, p. 385.

As in the case of inheritance to partible property, each male owner becomes a fresh stock of descent.[3]

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[1] See Mayne's "Hindu Law," 8th ed., p. 759.

[3] *Jogendra Bhupati Hurri Chundun Mahapatra* (*Raja*) v. *Nityanund Mansingh* (1890), 17 I. A. 128; 18 Calc. 151.

[3] *Muttuvaduganadha Tevar* v. *Periasami* (1896), 23 I. A. 128; 19 Mad. 451.

CHAPTER XVIII.

GIFTS AND WILLS.

THE chief importance of the Hindu law of gifts at the present time arises from the fact that the law of Hindu wills as administered by the Court of British India is founded on the Hindu law of gifts.

A Hindu of full age [1] can transfer by way of gift any property over which he has power of disposal,[2] or can create a charge upon his property by way of gift.[3] Power of gift.

As to separate acquisitions, see *ante*, pp. 249, 251. As to the gift of a share by a coparcener in a family governed by the Mitakshara law, see *ante*, p. 303. As to gifts of property, subject to rights of maintenance, see *ante*, pp. 84, 85. As to gifts of rights of worship, see *post*, p. 573.

The fact that he is disqualified by physical defects from inheritance does not prevent him giving away property which belongs to him.[4]

Subject to the restrictions as to persons not in existence at the time of the gift, any person is competent to accept a gift. Donee.

For instance, there is no prohibition in Hindu law against a gift to an infant,[5] or to an idiot.[6]

In either case his guardian could accept the gift for him.[7]

A minor donee who accepts property, or for whom property is accepted, burdened by any obligation is not bound by his acceptance; but if after attaining majority, and being aware of the obligation, he retains the property given, he becomes so bound.[8]

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1 *Gulab (Bai)* v. *Thakorelal Pranjivandas* (1912), 36 Bom. 622; 14 Bom. L. R. 748. There is nothing to prevent a minor making a small gift, such as would be usual in the case of persons in his position.

2 *Abhachari* v. *Ramachendrayya* (1863), 1 Mad. H. C. 393.

3 *Chetti Chalamanna* v. *Pandrangi Subbamma* (1883), 7 Mad. 23.

4 *Shamachurn Audhiccaree Byragee* v. *Roop Doss Byragee* (1866), 6 W. R. C. R. 68.

5 Macnaghten's "Hindu Law," Vol. ii. chap. viii. para. 36, pp. 243, 244.

6 *Kooldebnarain Shahee (Baboo)* v. *Wooma Coomaree (Mussamut)* (1863), Marsh. 357; 2 Hay, 370.

7 See *Joitaram* v. *Ramkrishna* (1902), 27 Bom. 31; 4 Bom. L. R. 754.

8 Act IV. of 1882 (Transfer of Property), s. 127; *Subramania Ayyar* v. *Sitha Lakshmi* (1896), 20 Mad. 147.

Under the Hindu law the legal requisites to constitute a perfect disposition by gift were the giving either orally or in writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's lifetime.[1]

"The reason for delivery being necessary is that the gift may not be resumed."[2]

Necessity for making over possession.

Under the Hindu law there must be such making over of possession to the donee as is possible under the circumstances.[3]

Where the land is in the possession of tenants a delivery of the documents of title, or a direction to the tenants to pay their rents to the donee or the receipt of rents by the donee is sufficient.[4]

Mere registration of a deed is insufficient,[5] but it has been held that delivery of the deed of gift is sufficient to pass the title.[6]

When the donor has done all he can to complete the gift, the gift cannot be set aside on the ground that the donor was out of passession.[7]

Since the passing of the Indian Contract Act (IX. of 1872), an agreement although without consideration is enforceable as a contract if it be made on account of natural love and affection and be registered under the law for the time being in force for the registration of documents.[8]

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[1] *Kishto Soondary Dabea* v. *Kishtomotee (Ranee)* (1863), Marsh, 367; *Dagai Dabee* v. *Mothura Nath Chattopadhya* (1883), 9 Calc. 859; 12 C. L. R. 530; *Dharmodas Das* v. *Nistarini Dasi* (1887), 14 Calc. 446; *Lakshimoni Dasi* v. *Nittyananda Day* (1892), 20 Calc. 464; *Ram Chandra Mukerjee* v. *Ranjit Singh* (1899), 27 Calc. 242; *Harjivan Anandram* v. *Naran Haribhai* (1867), 4 Bom. H. C. (A. C.) 31; *Bank of Hindustan* v. *Premchand Raichand* (1868), 5 Bom. H. C. (O. C.) 83, at p. 94; *Kachu Bayaji* v. *Kachoba Vithoba* (1873), 10 Bom. H. C. 491; *Lalubhai Surchand* v. *Amrit (Bai)* (1877), 2 Bom. 299; *Hasha* v. *Ragho Ambo Gondhali* (1881), 6 Bom. 165; *Sobhagchand Gulabchand* v. *Bhaichand* (1880), 6 Bom. 193; *Lakshmandas Sarupchand* v. *Dasrat* (1880), 6 Bom. 168; *Vasudev Bhat* v. *Narayan Daji Damle* (1882), 7 Bom. 131; *Kushal (Bai)* v. *Lakhma Mana* (1883), 7 Bom. 452; *Ugarchand Manakchand* v. *Madapa Somana* (1885), 9 Bom. 324; *Bhaskar Purshotam* v. *Sarasvatibai* (1892), 17 Bom. 486 (gift in contemplation of death); *Visalatchmi Ammal* v. *Subbu Pillai* (1871), 6 Mad. H. C. 270 (Ditto); *Balmakund* v. *Bhagwan Das* (1894), 16 All. 185.

[2] *Kali Das Mullick* v. *Kanhya Lal Pundit* (1884), 11 I. A. 218, at p. 230; 11 Calc. 121, at p. 132.

[3] *Man Bhari* v. *Nannidh* (1881), 4 All. 40; *Wannathan* v. *Keyakadath* (1871), 6 Mad. H. C. 194; *Abaji Gangadhar* v. *Mukta* (1893), 18 Bom. 688.

[4] *Harjivan Anandram* v. *Naran Haribhai* (1867), 4 Bom. H. C. (A. C. J.) 31; *Bank of Hindustan, &c.* v. *Ahmedbhai Haribhai* (1868), 5 Bom. H. C. (O. C. J.) 83.

[5] *Lakshimoni Dasi* v. *Nittyananda Day* (1892), 20 Calc. 464; *Dagai Dabee* v. *Mothuranath Chattopadhya* (1883), 9 Calc. 854; 12 C. L. R. 530; *Vasudev Bhat* v. *Narayan Daji Damle* (1882), 7 Bom. 131.

[6] *Balmakund* v. *Bhagwan Das* (1894), 16 All. 185.

[7] *Kali Das Mullick* v. *Kanhya Lal Pundit* (1884), 11 I. A. 218; 11 Calc. 121; *Balmakund* v. *Bhagwan Das* (1894), 16 All. 185.

[8] Act IX. of 1872, s. 25.

Possession can be taken by a guardian on behalf of a minor.[1]

Where the donor is the guardian of the donee, the Court will presume that continued possession of the subject of the gift by the former is really for the benefit of and in trust for the latter.[2]

Where one of the donees is in actual possession, a declaration by the donor assented to by the donee in possession is sufficient.[3]

Transfer how effected.

So far as the necessity for actual delivery is concerned, the law is now to be found in s. 123 [4] of the Transfer of Property Act (IV. of 1882), which enacted as follows :—

"For the purpose of making a gift of immovable property, transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

"For the purpose of making a gift of movable property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery.

"Such delivery may be made in the same way as goods sold may be delivered." [5]

Acceptance of a gift during the lifetime of the owner is still necessary.[6]

Donations *mortis causâ.*

Section 123 has no application to gifts of movable property made in contemplation of death.[7]

The Hindu law makes no distinction in favour of gifts in contemplation of death, as respects the legal requisites to constitute a perfect disposition by gift. When all these requisites have been fulfilled there is nothing in Hindu law to prevent effect being given to a gift in contemplation of death.[8]

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[1] See *Joitaram* v. *Ram Krishna* (1902), 27 Bom. 31.

[2] *Taro Bibee* v. *Ghasiram* (1878), 3 C. L. R. 247, relying on *Anundchund Rai* v. *Kishen Mohun Bunoja* (1805), 1 Ben. Sel. R. 115 (2nd ed., 152). See *Venkatachella Maniyakarer* v. *Thathammal* (1869), 4 Mad. H. C. 406.

[3] *Kushal* (*Bai*) v. *Lakhma Mana* (1883), 7 Bom. 452.

[4] *Dharmodas Das* v. *Nistarini Dasi* (1887), 14 Calc. 446; *Rambai* (*Bai*) v. *Mani* (*Bai*) (1898), 23 Bom. 234; *Madhavrao Moreshvar* v. *Kashibai* (1909), 34 Bom. 287; 12 Bom. L. R. 9; *Phul Chand* v. *Lakku* (1903), 25 All. 358. Cf. *Alabi Koya* v. *Mussa Koya* (1901), 24 Mad. 513.

[5] As to the delivery of goods sold, see Indian Contract Act (IX. of 1872), ss. 90–94.

[6] Act IV. of 1882, s. 122.

[7] *Ibid.*, s. 129.

[8] *Visalatchmi Ammal* v. *Subbu Pillai* (1871), 6 Mad. H. C. 270. See *Upendra Krishna Deb Bahadur* (*Kumara*) v. *Nabin Krishna Bose* (1869), 3 B. L. R. O. C. 113; S. C. *Krishna Deb* v. *Woopendra Krishna Deb*, 12 W. R. O. C. 4.

In one case [1] where the son of the donor had made over possession to the donee after the death of the donor, the gift was upheld.

Gifts to unborn persons.

Until the passing of the Hindu Transfers and Bequests Act, 1914 (Madras Act I. of 1914), and the Hindu Disposition of Property Act, 1916 (Act XV. of 1916), a Hindu could not by gift *inter vivos* or transfer for consideration, any more than he could by will,[2] confer any benefit upon a person who was not born at the time of the gift.[3]

Law in Madras.

The former Act applies to all transfers *inter vivos* made by persons governed by the Hindu law (including persons governed by the Marumakkatayam or the Aliyasantana law) who are domiciled within the limits of the Presidency of Madras.[4]

How far Act retrospective.

In the case of transfers *inter vivos* executed before the passing of the Act, the provisions of the Act apply to such of the dispositions thereby made as were intended to come into operation at a time which is subsequent to such date. Provided that this provision does not affect *bonâ fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Transfers and bequests in favour of unborn persons.

By section 3 of the Act a transfer *inter vivos* of any property is not invalid by reason only that the transferee is an unborn person at the date of the transfer.

Rule against perpetuity in regard to transfers.

By section 4 of the Act no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Hindu Disposition of Property Act, 1916.

The Hindu Disposition of Property Act, 1916 (Act XV. of 1916), extends, in the first instance, to the whole of British India, except the Province of Madras: Provided that the Governor General in Council may by notification in the Gazette of India, extend the Act to the Province of Madras.

Dispositions for benefit of persons not in existence.

By section 2 of the Act, subject to the limitations and provisions below mentioned, no disposition of property by a Hindu [5] by transfer *inter vivos* shall be invalid by reason only that any

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[1] *Bhaskar Purshotam* v. *Sarasvatibai* (1892), 17 Bom. 482.

[2] *Post*, pp. 533–536.

[3] See cases, *ante*, p. 522, note 1.

[4] Act I. (M. C.) of 1914, s. 2.

[5] As to the application of the Act to Khojas see sec. 5 of the Act.

person for whose benefit it may have been made was not in existence at the date of such disposition.

The limitations and provisions referred to are to be found in sections 13, 14, and 20 of the Transfer of Property Act, 1882 (IV. of 1882),[1] which are as follows :—

Transfer for benefit of unborn person.

Sec. 13.—Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Rule against perpetuity.

Sec. 14.—No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

When unborn person acquires vested interest on transfer for his benefit.

Sec. 20.—Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Failure of prior disposition.

Where a disposition of property fails by reason of any of the above limitations, any disposition intended to take effect after or upon failure of such prior disposition also fails.[2]

Definition of "will."

" A will is the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death." [3]

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[1] Act XV. of 1916, s. 3.

[2] Act XV. of 1916, s. 4.

[3] Indian Succession Act (X. of 1865), s. 3 ; Probate and Administration Act (V. of 1881), s. 3.

The conduct of the testator and the surrounding circumstances may sometimes show whether a document was intended to be a present gift or a will.[1]

Law founded on law of gifts.

The Hindu law books do not provide rules as to wills in distinction from gifts *inter vivos*, but the introduction of gifts by will into general use has followed in India, as it has done in other countries, the transfer of property *inter vivos*,[2] and under the English rule a body of law applicable to wills has grown up from the foundation of the Hindu law of gifts.[3]

Limits of analogy.

"Even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred." [4]

There is not a complete identity between the law of gifts and that of wills.[5]

The history of the practice of making wills by Hindus is somewhat obscure. It seems to have commenced in Calcutta about the middle of the eighteenth century of the Christian Era. At one time, the right of making a will was denied to Hindus by the Courts, but after considerable fluctuation of opinion the practice was recognized as settled in 1832. Probably the practice arose from the desire of Hindus to enjoy a privilege which was exercised by their Christian and Mahomedan fellow-subjects.

Subject of will.

A Hindu who is of sound mind,[6] and not a minor,[7] within the

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[1] See *Chunder Mohinee Dossee* v. *Hurrosoonduree Dossee* (1865), 3 W. R. C. R. 200; *post*, pp. 527, 528.

[2] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 68; 9 B. L. R. 377, at p. 397; 18 W. R. C. R. 359, at p. 366.

[3] *Ibid.*

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 69; 9 B. L. R. 377, at p. 399; 18 W. R. C. R. 359, at p. 366; *Motivahoo (Bai)* v. *Mamoobai (Bai)* (1897), 24 I. A. 93, at p. 105; 21 Bom. 709, at p. 721; 1 C. W. N. 366, at pp. 368, 369. See *Beer Pertab Sahee (Baboo)* v. *Rajender Pertab Sahee (Maharajah)* (1867), 12 M. I. A. 1, at p. 38; 9 W. R. P. C. 15, at p. 22.

[5] See *Bishen Chand (Rai)* v. *Asmaida Koer (Mussumat)* (1884), 11 I. A. 164, at p. 177; 6 All. 560, at p. 572; *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1880), 7 I. A. 181, at p. 194; 5 Bom. 48, at pp. 61, 62; 7 C. L. R. 320, at p. 328; *Lakshmibai* v. *Ganpat Moroba* (1867), 4 Bom. H. C. O. C. 150, at p. 158; *Seth Mulchand Badharsha* v. *Mancha (Bai)* (1883), 7 Bom. 491, at p. 493.

[6] See Indian Succession Act (X. of 1865), s. 46, applied to certain Hindu wills (*post*, p. 545), by the Hindu Wills Act (XXI. of 1870), s. 2; *Woomesh Chunder Biswas* v. *Rashmohini Dassi* (1893), 21 Calc. 279, at p. 291; S. C. affirmed on appeal, *Rashmohini Dasi* v. *Umesh Chunder Biswas* (1898), 25 I. A. 109; 25 Calc. 824; 2 C. W. N. 321.

[7] Indian Succession Act (X. of 1865), s. 46, applied to certain Hindu wills (*post*, p. 545), by the Hindu Wills Act (XXI. of 1870), s. 2; *Hardwari Lal* v. *Gomi* (1911), 33 All. 525; W. Macnaghten's "Hindu Law," vol. ii. p. 219, note; *Cossinaut Bysack* v. *Hurrosoondery Dossee* (1819), F. Macnaghten, 81; 2 Morley's "Digest," 198.

meaning of the Indian Majority Act (IX. of 1875),[1] can by will dispose of all property which he may give away in his lifetime.[2]

"Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*." [3]

The owner of an impartible estate can dispose of it by will, unless there be a special family custom, or a tenure prohibiting alienation.[4]

A Hindu woman can dispose of her *stridhan* property by will,[5] subject in some cases to the consent of her husband.[6]

As to the power to transfer her *stridhan* property by gift, see *ante*, pp. 443, 445.

She cannot by will dispose of the income or accumulations of an estate, in which she is only a restricted owner, and which she has not shown an intention to appropriate, although she may have a power of disposing of them during her lifetime.[7]

In cases not governed by the Hindu Wills Act [8] the form of document, provided it be of a testamentary character, is immaterial. No formalities are necessary.[9] A nuncupative will is permissible.[10] Form of will.

The following have been held to be of a testamentary nature :—

1. A statement before a Revenue official, which was recorded by him.[11]
2. An unsigned will.[12]

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[1] *Gulab (Bai)* v. *Thakorelal* (1912), 36 Bom. 622; 14 Bom. L. R. 748; *Krishnamachariar* v. *Krishnamachariar* (1913), 38 Mad. 166.

[2] See Hindu Wills Act (XXI. of 1870), s. 3, *post*, p. 543.

[3] *Beer Pertab Sahee (Baboo)* v. *Rajender Pertab Sahee (Maharajah)* (1867), 12 M. I. A. 1, at p. 38; 9 W. R. P. C. 15, at p. 22; *Adjoodhia Gir* v. *Kashee Gir* (1872), 4 N. W. P. 31; *Pitum Koonwar (Musst)* v. *Joy Kishen Doss* (1866), 6 W. R. C. R. 101; *Vallinayagam Pillai* v. *Pachche* (1863), 1 Mad. H. C. 326.

[4] *Venkata Surya Mahipati Rama Krishna Rao Bahadoor (Sri Raja Rao)* v. *Court of Wards* (1898), 26 I. A. 83; 22 Mad. 383; 3 C. W. N. 415; 1 Bom. L. R. 277; *Sartaj Kuari (Rani)* v. *Deoraj Kuari (Rani)* (1888), 15 I. A. 51; 10 All. 272; *Beresford* v. *Ramasubba* (1889), 13 Mad. 197.

[5] *Ante*, pp. 443, 445.

[6] *Ante*, p. 443.

[7] *Ante*, pp. 474, 475.

[8] *Post*, pp. 542, 543.

[9] *Bapuji Jagannath* (1895), 20 Bom. 674; *Radhabai* v. *Ganesh Tatya Gholap* (1878), 3 Bom. 7, following *Muncherji Pestonjee* v. *Narayen Luxamonjee* (1863), 1 Bom. H. C. 77; *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224.

[10] *Gokul Chand* v. *Mangal Sen* (1903), 25 All. 313; *Hari Chintaman Dikshit* v. *Moro Lahskman* (1886), 11 Bom. 89; *Bhagvan Dullabh* v. *Kala Shankar* (1877), 1 Bom. 641; *Srinivasammal* v. *Vijayammal* (1864), 2 Mad. H. C. 37.

[11] *Kalian Singh* v. *Sanwal Singh* (1884), 7 All. 163.

[12] *Tarachund Bose* v. *Nobeen Chunder Mitter* (1865), 3 W. R. C. R. 138.

3. A draft will.[1]
4. A petition to the Revenue authorities.[2]
5. Entries in a wajib-ul-arz.[3]
6. A matrimonial arrangement deed.[4]
7. A mooktarnamah (power of attorney).[5]
8. A deed of settlement made at the time of an adoption.[6]
9. A deed of assignment.[7]
10. An agreement.[8]

One of the invariable tests is whether the document is revocable or not.[9]

A document, although in name a will, which is intended to speak from the time when it was executed, is not a will.[10]

Any instrument which confers or reserves a life estate to the maker cannot, according to the Bombay High Court, be a will.[11] This proposition is, it is submitted, not invariable.[12]

Construction of wills.

There are no technical rules for the construction of Hindu wills.[13]

First consider intention, then apply law.

"The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will together [14] whether,

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[1] *Janki* v. *Kallu Mal* (1908), 31 All. 236.

[2] *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7; 14 B. L. R. 226; 22 W. R. C. R 409; *Kollany Koer (Mussamut)* v. *Luchmee Pershad* (1875), 24 W. R. C. R. 395. See also *Hurpurshad* v. *Sheo Dyal* (1876), 3 I. A. 259; 26 W. R. C. R. 55, which was a case under the Oudh Estates Act (I. of 1869).

[3] *Mathura Das* v. *Bhikhan Mal* (1896), 19 All 16. See *Lali (Musammat)* v. *Murli Dhar* (1906), 33 I. A. 97; 28 All. 488; 10 C. W. N. 730; 8 Bom. L. R. 402; *Sahodra* v. *Ganesh Parshad* (1905), 10 C. W. N. 249.

[4] *Din Tarini Debi* v. *Krishna Gopal Bagchi* (1908), 36 Calc. 149; 13 C. W. N. 291.

[5] *Kollany Koer (Mussamut)* v. *Luchmee Pershad* (1875), 24 W. R. C. R. 395; *Kooldeb Narain Shahee (Baboo)* v. *Woomacoomaree (Mussamut)* (1863), Marshall, 357; 2 Hay, 370.

[6] *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490.

[7] *Ishri Singh (Thakur)* v. *Baldeo Singh* (1884), 11 I. A. 135; 10 Calc. 792; *Udai Raj Singh* v. *Bhagwan Baksh Singh* (1910), 37 I. A. 46; 32 All. 227; 14 C. W. N. 641; 12 Bom. L. R. 409.

[8] *Rajammal* v. *Authiammal* (1909), 33 Mad 304.

[9] *Rajammal* v. *Authiammal* (1909), 33 Mad. 304; *Sita Koer (Musst)* v. *Deo Nath Sahay (Munshi)* (1904), 8 C. W. N. 614.

[10] *Brijraj Singh* v. *Sheodan Singh* (1913), 40 I. A. 161; 35 All. 337; 17 C. W. N. 949; 15 Bom. L. R. 652.

[11] *Pirsab* v. *Gurappa Basappa* (1913), 38 Bom. 227; 16 Bom. L. R. 111.

[12] *Rajammal* v. *Authiammal* (1909), 23 Mad. 304.

[13] Technical rules of English conveyancing are not to be made use of in construing Hindu wills, *Jogeswar Narain Deo* v. *Ram Chund Dutt* (1896), 23 I. A. 37, at p. 49; 23 Calc. 670, at p. 679.

[14] Indian Succession Act (X. of 1895), s. 69, applied to certain Hindu wills by the Hindu Wills Act (XXI. of 1870), s. 2, *post*, p. 545; *Amirthayyan* v. *Ketharammayyan* (1890), 14 Mad. 65, at p. 69. An invalid gift over may indicate the testator's intention to limit an estate which he has created; *Anandrao Vinayak* v. *Administrator General of Bombay* (1895), 20 Bom. 450.

assuming the limitations therein mentioned to take effect,[1] an interest claimed under it was intended under the circumstances to be conferred.[2] The will is to be construed in its plain ordinary meaning.[3]

Benignant construction.

"A benignant construction is to be used and . . . if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows." [4]

Surrounding circumstances.

In construing a will the Court must have regard to the words used, and then may take into consideration the surrounding circumstances,[5] the law relative to the subject,[6] and where there is ambiguity [7] the ordinary notions and wishes of Hindus.[8]

It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance, which they are enabled to alienate.[9]

Literal construction.

"Where the language of the will is clear and consistent, it shall receive its literal construction unless there is something in the will itself to suggest departure from it." [10]

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[1] What is intended to be a life estate cannot be extended into a greater estate by the failure of the limitations, *Tarakeswar Roy (Kumar)* v. *Shoshi Shikareswar (Kumar)* (1883), 10 I. A. 51; 9 Calc. 952; 13 C. L. R. 62.

[2] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 79; 9 B. L. R. 377, at p. 409; 18 W. R. C. R. 359, at p. 371; *Sookhmoy Chunder Dass* v. *Monohurri Dasi (Srimati)* (1885), 12 I. A. 103, at p. 110; 11 Calc. 684, at p. 692.

[3] *Bhagbutti Daee (Mussumat)* v. *Bholanath Thakoor (Chowdry)* (1875), 2 I. A. 256, at pp. 259, 261; 24 W. R. C. R. 168, at p. 169; *Kristoromoney Dossee (Sreemutty)* v. *Norendro Krishna Bahadoor (Maharajah)* (1888), 16 I. A. 29, at p. 41; 16 Calc. 383, at p. 394.

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 95; 9 B. L. R. 377, at p. 395; 18 W. R. C. R. 350, at p. 364.

[5] *Soorjeemoney Dossee (Sreemutty)* v. *Denobundhoo Mullick* (1857) 6 M. I. A. 526, at p. 550; 4 W. R. P. C. 114; *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112, at p. 124.

[6] *Bissonauth Chunder* v. *Bamasoondery Dossee (Sreemutty)* (1867), 12 M. I. A. 41, at p. 59; S. C. *Prankisto Chunder* v. *Bamasoondery Dossee*, 9 W. R. P. C. 1; *Karsandas Natha* v. *Ladkavahu* (1887), 12 Bom. 185, at p. 200; *Lakshmibai* v. *Hirabai* (1886), 11 Bom. 69, at p. 74; *Motilal Mithalal* v. *Advocate General of Bombay* (1910), 35 Bom. 279; 13 Bom. L. R. 471.

[7] *Parami* v. *Mahadevi* (1909), 3 Bom. 278; 12 Bom. L. R. 196.

[8] See *Radha Prosad Mullick* v. *Ranimoni Dassi* (1908), 35 I. A. 118, at p. 129; 35 Calc. 896, at p. 902; 12 C. W. N. 729, at p. 737; 10 Bom. L. R. 604; *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7, at pp. 14, 15; 14 B. L. R. 226, at pp. 231, 232; 22 W. R. C. R. 409, at p. 410.

[9] *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7, at pp. 14, 15; 14 B. L. R. 226, at pp. 231, 232; 22 W. R. C. R. 409, at p. 410; see *ante*, pp. 441, 442.

[10] *Gurusami Pillai* v. *Sivakami Ammal* (1895), 22 I. A. 119, at p. 128; 18 Mad. 347, at p. 358. See *Krishnarao Ramchandra* v. *Benabai* (1895), 20 Bom. 571.

"Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention."[1]

Technical words.

"Technical words or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense."[2]

Disinherison.

By giving his property by will to some other person,[3] a Hindu can defeat the rights of his heirs.[4]

He can defeat the inheritance of a son whom he has taken in adoption,[5] or of a son taken in adoption subsequently to the will.[6]

Right of maintenance.

He cannot by will defeat the legal right of his wife or any other person to maintenance;[7] but he can by will deprive his wife of the share which she gets on partition,[8] and, provided he leaves sufficient property for the maintenance of his widow and those whom he is legally bound to support, a Hindu can dispose of his property by gift or will, so as to free it from claims to maintenance.[9]

Tagore case.

The leading case in the subject of Hindu gifts and wills is the well-known *Tagore* case,[10] which laid down principles which

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[1] *Lalit Mohun Singh Roy* v. *Chukkun Lall Roy* (1897), 24 I. A. 76, at p. 85; 24 Calc. 834, at p. 846; 1 C. W. N. 387, at p. 388.

[2] *Ibid.*

[3] *Prosunno Coomar Ghose* v. *Tarrucknath Sircar* (1873), 10 B. L. R. 267; S. C. *Tarucknath Sircar* v. *Prosono Coomar Ghose*, 19 W. R. C. R. 48.

[4] *Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row* (1838), 2 M. I. A. 54; *Bawa Misser* v. *Bishen Prokash Narain Singh* (1868), 10 W. R. C. R. 287; *Narayanasvami Chetti* v. *Arunachala Chetti* (1832), 1 Mad. H. C. 487; *Subbayya* v. *Surayya* (1887), 10 Mad. 251; *Narottam Jagjivan* v. *Narsandas Harikisandas* (1866), 3 Bom. H. C. A. C. 6.

[5] *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi* (1871), 8 Bom. H. C. O. C. 196; *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490.

[6] *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (1869), 6 Bom. H. C. A. C. 224. In this case the natural father was at the time of the adoption aware of the provisions of the will.

[7] *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (1908), 12 C. W. N. 808; see *ante*, pp. 84, 85.

[8] *Poorendra Nath Sen* v. *Hemangini Dasi* (1908), 36 Calc. 75; see *ante*, p. 334.

[9] *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1890), 17 Calc. 886; *Bhoobunmoyee Debea Chowdhrain* v. *Ramkissore Acharj Chowdhry*, Ben. S. D. A. 1860, p. 485, at p. 489; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1888), 15 Calc. 292, at p. 306. See *Razabai* v. *Sadu* (1871), 8 Bom. H. C. A. C. 98; *Lakshmi* v. *Subramanya* (1889), 12 Mad. 490, at p. 494; answers of law officers in *Mulraz Lachmia* v. *Chalekany Vencata Rama Jaganadha Row* (1838), 2 M. I. A. 54, at p. 57. The widow's claim to maintenance cannot be defeated merely by implication, *Joytara* v. *Ramhari Sirdar* (1884), 10 Calc. 638; *Comulmony Dossee* v. *Rammanath Bysack* (1843), 1 Fulton, 189, at p. 193.

[10] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. C. R. 359.

have been the foundation of most other decisions on the subject of Hindu gifts, settlements, and wills.

The facts of that case, so far as at present material, are shortly as follows :—The testator gave his property to A for life, and on A's death to the eldest son of A who should be born during the testator's life for the life of such eldest son; "and after the determination of that estate to the use of the first and other sons successively of the eldest son of " A, "according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of" A "who shall be born during" the testator's life "successively, according to their respective seniorities for the life of each such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of " A, "and the heirs male of their respective bodies issuing, so that the elder of the sons of" A born in the testator's lifetime, "and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and take before the younger of the sons of" A born in the testator's lifetime, "and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure and determination of the uses and estates hereinbefore limited, to the use of each of the sons of" A who shall be born after the death of the testator "successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of them and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of" B for "the term of his natural life and after the failure or determination of that estate," then to the sons of C, "and their sons and the heirs male of their body respectively, in like manner as for" A's, "and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of" D "successively, and respectively in like manner as in the case of sons of" A and C.
These are what are called in England estates in tail male.

The following principles are to be found in the decision in the above case, and in the decisions founded thereon.

Presumption that whole interest passes.

I. Where property is given or bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him.[1]

"If an estate were given to a man simply without express words of

[1] Indian Succession Act (X. of 1865), s. 82, applied to certain Hindu wills by the Hindu Wills Act (XXI. of 1870), s. 2; *Damoderdas Tapidas v. Dayabhai Tapidas* (1898), 25 I. A. 126; 22 Bom. 833; 2 C. W. N. 417. This principle is equally applicable to the cases of Hindu wills, not governed by the Hindu Wills Act, see cases in next note.

inheritance, it would, in the absence of a conflicting context, carry by Hindu law . . . an estate of inheritance. If there were added to such gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass."[1]

In spite of an apparent absolute interest it may be shown by other provisions of the will or gift that a life interest only was intended to be given.[2]

As to bequests by husbands to their wives, see *ante*, pp. 441–443.

Attempt to alter law of inheritance.

II. "All estates of inheritance created by gift, arrangement, or will, so far as they are inconsistent with the general law of inheritance, are void as such."

"A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."[3] This rule does not prevent the validity of a life estate, which precedes an invalid provision for the succession.[4]

Repugnant condition.

III. Where an absolute estate is given by the gift or will, a condition repugnant to the estate previously given, or a restriction in the mode of enjoyment, is void.[5]

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[1] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 65; 9 B. L. R. 377, at p. 395; 18 W. R. C. R. 359, at p. 365; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1897), 24 I. A. 76, at p. 88; 24 Calc. 834, at p. 849; 1 C. W. N. 387, at p. 390; *Manikyamala Bose* v. *Nanda Kumar Bose* (1906), 33 Calc. 1306; 11 C. W. N. 12. See *Anundomohey Dossee* v. *Doe dem East India Company* (1859), 8 M. I. A. 43; 4 W. R. P. C. 51; *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (1905), 32 I. A. 181; 33 Calc. 23; 10 C. W. N. 1; 7 Bom. L. R. 904.

[2] *Somasundara Mudaliar* v. *Ganga Bissen Soni* (1904), 28 Mad. 386.

[3] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 65; 9 B. L. R. 377, at pp. 394, 395; 18 W. R. C. R. 359, at p. 364 (in that case an attempt was made to create an estate in tail male); *Tarakeswar Roy (Kumar)* v. *Shoshi Shikareswar (Kumar)* (1883), 10 I. A. 51; 9 Calc. 952; 13 C. L. R. 62; *Kristoromoney Dossee (Sreemutty)* v. *Norendro Krishna Bahadoor (Maharajah)* (1888), 16 I. A. 29; 16 Calc. 383; *Vullabhdas Damodhar* v. *Thucker Gordhandas Damodhar* (1890), 14 Bom. 360; *Purna Sashi Bhattacharji* v. *Kalidhan Rai Chowdhuri* (1911), 38 I. A. 112; 38 Calc. 603; 15 C. W. N. 693; 13 Bom. L. R. 451 (a case of a settlement *inter vivos*), and other cases cited in Phillips' and Trevelyan's "Hindu Wills," 2nd ed., pp. 45–47; *Kunhamina (Mooriyat Peetikayil)* v. *Kunhambi (Mooriyat Peetikayil)* (1908), 32 Mad. 315.

[4] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 65; 9 B. L. R. 377, at pp. 394, 395; 18 W. R. C. R. 359, at p. 364; *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1903), 31 Calc. 111; 7 C. W. N. 688. Cf. Indian Succession Act (X. of 1865), s. 103, applied to certain Hindu wills by the Hindu Wills Act (XXI. of 1870), s. 2 (*post*, p. 545).

[5] See Indian Succession Act (X. of 1865), s. 125, and cases *post*, p. 533, notes 2–8 below.

This applies also to a partition or other arrangement or transfer.[1]

A prohibition against alienation [2] (even in the case of a gift to Brahmins),[3] against obtaining possession,[4] or against partition,[5] or a provision that the property should not be liable for the debts of the beneficiary,[6] a provision that the expenditure is to be controlled by certain trustees,[7] or a provision that the income is to be accumulated,[8] may be disregarded by the beneficiary.

A lawful condition not inconsistent with the gift or bequest is valid ; [9] but a gift or bequest upon a condition which is impossible,[10] or is contrary to law or morality,[11] is void.

Bequest to unborn person.

IV. A person capable of taking under a will, gift, or settlement must, either in fact or in contemplation of law,[12] be in existence at the death of the testator,[13] or date of the gift,[14] as the case may be.

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[1] *Venkatramanna* v. *Bramanna Sastrulu* (1869), 4 Mad. H. C. 345; *Ali Hasan* v. *Dhirja* (1882), 4 All. 518 (a mortgage); *Bhairo* v. *Parmeshri Dayal* (1884), 7 All. 516 (deed of compromise).

[2] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 65; 9 B. L. R. 377, at p. 395; 18 W. R. C. R. 359, at p. 365; *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1879), 6 I. A. 182; 5 Calc. 438; 5 C. L. R. 296; *Sookhmoy Chunder Dass* v. *Monohurri Dasi* (*Srimati*) (1885), 12 I. A. 103; 11 Calc. 684; *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37; 15 Calc. 409; *Chundi Churn Barua* v. *Sidheswari Debi* (*Rani*) (1888), 15 I. A. 149; 16 Calc. 71; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1897), 24 I. A. 76; 24 Calc. 834; 1 C. W. N. 387.

[3] *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (1881), 4 Mad. 200.

[4] *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (1882), 8 Calc. 378; 10 C. L. R. 207; *Shivgar Dayagar* (*Gosavi*) v. *Rivett-Carnac* (1888), 13 Bom. 463.

[5] *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (1875), 1 Calc. 104; *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37; 15 Calc. 409; *Narayan* v. *Kannan* (1884), 7 Mad. 315.

[6] *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37; 15 Calc. 409.

[7] *Motivahu* (*Bai*) v. *Mamubai* (*Bai*) (1895), 19 Bom. 647.

[8] *Kolla Subramaniam Chetti* v. *Thellanayakulu Subramaniam Chetti* (1881), 4 Mad. 124. See *Raneemoney Dossee* (*Sreemutty*) *v. Premmoney Dossee* (*Sreemutty*) (1905), 9 C. W. N. 1033; *post*, p. 542.

[9] See *Hureehur Mookerjee* v. *Raj Kishen Mookerjee* (1874), 23 W. R. C. R. 236; *Ganendro Mohun Tagore* v. *Juttendro Mohun Tagore* (*Rajah*) (1874), 1 I. A. 387; 14 B. L. R. 60; 22 W. R. C. R. 377; *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 578. See Part XVI. of Indian Succession Act (X. of 1865) applied to certain Hindu wills (*post*, p. 545).

[10] See Indian Succession Act (X. of 1865), s. 115, applied to certain Hindu wills by s. 2 (*post*, p. 545) of the Hindu Wills Act (XXI. of 1870).

[11] See *Ibid.*, s. 114. Where immoral conditions are subsequent to the gift, they are void and the gift is good, see *Ram Sarup* v. *Bela* (*Mussumat*) (1883), 11 I. A. 44; 6 All. 313.

[12] As in the case of a child in the womb or of an adopted son.

[13] *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at pp. 67, 70; 9 B. L. R. 377, at pp. 397, 400; 18 W. R. C. R. 359, at pp. 366, 367; *Venkata Narasimha Appa Rao Bahadur* (*Sri Raja*) v. *Venkata Purashothama Jaganadha Gopala Row Bahadur* (*Sri Raja Suraneni*) (1908), 31 Mad. 310.

[14] *Pudmanund Singh Bahadoor*

As to the present law on this subject, see *post*, pp. 536–539.

As to grants of impartible estates by Government, see *ante*, pp. 260–262.

In laying down the above rule in the *Tagore* case the Judicial Committee desired "not to express any opinion as to certain exceptional cases of provisions by means of contract or of conditional gift on marriage or other family provision for which authority may be found in Hindu law or usage."

This rule was applicable to all wills of Hindus, by whatever school they may be governed,[1] and whether they were or were not subject to the Hindu Wills Act.[2]

It applied whether the bequest was to take effect immediately on the death of the testator, or was to be postponed by the intervention of a prior estate, or was contingent upon the happening of some event.[3] It applied to a person taking under a power of appointment contained in a will,[4] and indeed to every form of bequest.[5]

A bequest to the future wife of the testator's son in case he should marry within ten years from the testator's death was upheld on the ground that the wife was in fact born before the death of the testator.[6]

Gift to a class.

The decisions as to gifts to a class,[7] some of the members of which are incapable of taking, have given rise to some difficulty.

(*Raja*) v. *Hayes* (1901), 28 I. A. 152; 28 Calc. 72; 5 C. W. N. 806; 3 Bom. L. R. 803 (a case of a *pottah* given in settlement of litigation).

[1] *Mangaldas Nathubhoy* (*Sir*) v. *Krishnabai* (1881), 6 Bom. 38.

[2] *Alangamonjori Dabee* v. *Sonamoni Dabee* (1882), 8 Calc. 637; 10 C. L. R. 459. See *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (1882), 8 Calc. 378, at p. 390; 10 C. L. R. 207, at p. 215; *Jairam Narronji* v. *Kuverbai* (1885), 9 Bom. 491, at p. 506.

[3] *Tarakeswar Roy* (*Kumar*) v. *Shoshi Shikareswar* (*Kumar*), 10 I. A. 51; 9 Calc. 952; 13 C. L. R. 62; *Chundi Churn Barua* v. *Sidheswari Debi* (*Rani*) (1888), 15 I. A. 149; 16 Calc. 71; *Kristoromoney Dossee* (*Sreemutty*) v. *Norendro Krishna Bahadoor* (*Maharajah*) (1888), 16 I. A. 29; 16 Calc. 383; *Nistarini Dassi* v. *Nundo Lal Bose* (1902), 30 Calc. 369, at p. 385; 7 C. W. N. 353, at p. 364; *Javerbai* v. *Kablibai* (1891), 16 Bom. 492; *Anandrao Vinayak* v. *Administrator-General of Bombay* (1895), 20 Bom. 450; *Ramguttee Acharjee* v. *Kistosoonduree Debia* (1873), 20 W. R. C. R. 472.

[4] *Motivahoo* (*Bai*) v. *Mamoobai* (*Bai*) (1897), 24 I. A. 93; 21 Bom. 709; 1 C. W. N. 366; *Upendra Lal Boral* v. *Hem Chundra Boral* (1897), 25 Calc. 405; 2 C. W. N. 295; *Goswami Shri Girdharji* v. *Madhowdas Premji* (1893), 17 Bom. 600, at p. 617; *Javerbai* v. *Kablibai* (1891), 16 Bom. 492. See *Tribhuvandas Ruttonji Mody* v. *Gangadas Tricumji* (1893), 18 Bom. 7.

[5] A gift to a person to be adopted by a son's wife was held to be void, *Kashinath Chimnaji* v. *Chimnaji Sadashiv* (1906), 30 Bom. 477.

[6] *Nafar Chandra Kundoo* v. *Ratan Mala Debi* (1910), 15 C. W. N. 66; *Dines Chandra Roy Chowdhry* v. *Biraj Kamini Dasi* (1911), 39 Calc. 87; 15 C. W. N. 945; *Shyama Charan Bhuttacharya* v. *Sarup Chandra Sen* (1912), 17 C. W. N. 39.

[7] In Jarman on Wills (6th ed.), 336, we find the following:—"A number of persons are popularly said to form a class when they can be designated by some general name as 'children,' 'grandchildren,' 'nephews,' but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in

Where there is a bequest to a class, and the class is to be ascertained at the date of the death of the testator, the members of the class who are then capable of taking are entitled to the bequest.[1]

Where there is a present gift, or bequest to persons capable of taking, which is intended afterwards to open out, and let in others who are in law not capable of taking, the gift or bequest operates in favour of the persons capable of taking.[2]

Where there was a bequest to a class, the members of which were to be ascertained at a date later than the date of the death of the testator, the bequest enured for the benefit of such members of the class as are capable of taking, although the class might be in terms wide enough to include persons not born at the date of the death of the testator.[3] These principles

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equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."

A bequest of a right of residence to a body of persons is not "a gift to a class," *Krishnanath Narayan* v. *Atmaram Narayan* (1891), 15 Bom. 543. A gift to named individuals would not ordinarily be a gift to a class, see *Sallay Mahomed* v. *Janbai* (*Lady*) (1901), 3 Bom. L. R. 785.

[1] See Indian Succession Act (X. of 1865), s. 98. In this case the class did not include any persons born after the death of the testator, and therefore did not offend against the rule laid down in the *Tagore* case (*ante*, p. 533).

[2] See *Bishen Chand* (*Rai*) v. *Asmaida Koer* (*Mussumat*) (1883), 11 I. A. 164; 6 All. 560. In that case the Judicial Committee were considering a family arrangement, but in *Ram Lal Sett* v. *Kanai Lal Sett* (1886), 12 Calc. 663, which was a case of a gift *inter vivos*, Wilson, J., treated the judgment as applicable to the law of wills. See also *Manjamma* v. *Padmanabhayya* (1889), 12 Mad. 393 (a case of a settlement). This view was accepted in *Bhagabati Barmanya* v. *Kali Charan Singh* (1911), 38 I. A. 54; 38 Calc. 468; 15 C. W. N. 395; 13 Bom. L. R. 375; S. C. in Court below (1905), 32 Calc. 992; 9 C. W. N. 749, and in *Bhoba Tarini Debya* v. *Peary Lal Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 578, which was a case of a will governed by the Hindu Wills Act.

[3] This has now been settled by *Bhagabati Barmanya* v. *Kali Charan Singh* (1911), 38 I. A. 54; 38 Calc. 468; 15 C. W. N. 393; 13 Bom. L. R. 375; S. C. in Court below (1905), 32 Calc. 992; 9 C. W. N. 749; see *Radha Prasad Mullick* v. *Ranimoni Dasi* (1910), 38 Calc. 188; 15 C. W. N. 113; see S. C. on appeal, *Ranimoni Dasi* v. *Radha Prasad Mullick* (1914), 41 I. A. 176; 41 Calc. 1007; 18 C. W. N. 873; 16 Bom. L. R. 787 (this case was decided with reference to the Hindu Wills Act); *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (1897), 24 Calc. 646; 1 C. W. N. 578; *Ram Lal Sett* v. *Kanai Lal Sett* (1886), 12 Calc. 663 (a case of a family settlement); *Ranganadha Mudaliar* v. *Baghirathi Ammal* (1906), 29 Mad. 412; *Khettermohan Mullick* v. *Gunganarain Mullick* (1881), 4 C. W. N. 671, n.; *Krishnaramani Dasi* (*S. M.*) v. *Ananda Krishna Bose* (1869), 4 B. L. R. O. C. 231, at p. 279; *Soma Sundara Mudaliar* v. *Ganga Bissen Soni* (1904), 28 Mad. 386; *Manjamma* v. *Padmanabhayya* (1889), 12 Mad. 393; *Advocate-General* v. *Karmali* (1903), 29 Bom. 133, at p. 150; *Mangaldas Parmanandas* v. *Tribhuvandas Narsidas* (1891), 15 Bom. 652; *Tribhuvandas Ruttonji Mody* v. *Gangadas Tricumji* (1893), 18 Bom. 7; *Krishnarao Ramchandra* v. *Benabai* (1895), 20 Bom. 571; *Gordhandas* v. *Ramcoover* (*Bai*) (1901), 26 Bom. 449, at p. 468; 3 Bom. L. R. 857. *Contrâ*, *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (1877), 2 Calc. 262; *Kherodemoney Dossee* v. *Doorgamoney Dossee* (1878), 4 Calc. 455; 3 C. L. R. 315; *Chundramoney Dossee* v. *Motilal Mullick* (1879), 5 C. L. R. 496; *Rojomoyee Dassee* v. *Troylucko Mohiney*

would apply also in cases governed by the Hindu Transfers and Bequests Act, 1914,[1] and the Hindu Disposition of Property Act, 1916,[2] where the class is to be ascertained within the limits prescribed by those enactments.

Where it is impossible to infer that the testator had the intention of benefiting at least those members of the class who are capable of taking there is authority to show that the whole bequest fails.[3]

Law in Madras. Application and extent of Hindu Transfer and Bequests Act.

In the Madras Presidency the law on this subject has been declared by the Hindu Transfers and Bequests Act, 1914,[4] which applies to all wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras,[5] including Hindus governed by the Marumakkatayam or the Alyasantara law.[6]

In the case of wills executed before the date of that Act (24th March, 1914), the provisions of the Act apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to that date.[7]

Bequests in favour of unborn persons.

A disposition by will of any property shall not be invalid by reason only that the legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be.[8]

Rule against perpetuity in regard to bequests.

No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.[9]

This provision is identical with that contained in sec. 101[10] of the Indian Succession Act (X. of 1865) which was adopted by the Hindu Wills Act, 1870 (XXI. of 1870), s. 2, and by the Oudh Estates Act (I. of 1869), s. 12.

Hindu Disposition of Property Act.

The Hindu Disposition of Property Act, 1916,[11] which came

Dassee (1901), 29 Calc. 260, at p. 276; 6 C. W. N. 267, at p. 278; *Bramamayi Dasi (Srimati)* v. *Jages Chandra Dutt* (1871), 8 B. L. R. 400; *Brajanath Dey Sirkar* v. *Anandamayi Dasi* (1871), 8 B. L. R. 208; *Jairam Narronji* v. *Kuverbai* (1885), 9 Bom. 491.

[1] Act I. (M. C.) of 1914, s. 5, below.

[2] Act XV. of 1916, s. 3, *post*, p. 537.

[3] *Khimji Jairam Narronji* v. *Morarji Jairam Narronji* (1897), 22 Bom. 533. See *Chundi Churn Barua* v. *Sidheswari Debi (Rani)* (1888), 15 I. A. 149; 16 Calc. 71.

[4] Act I. (M. C.) of 1914.

[5] *Ibid.*, s. 2 (1).

[6] *Ibid.*, s. 2 (2).

[7] *Ibid.*, s. 2 (2).

[8] *Ibid.*, s. 3. See *Kudapa Venkayamma* v. *Narasimma* (1916), 31 Mad. L. J. 33.

[9] Act I. (M. C.) of 1914, s. 5.

[10] *Post*, p. 538.

[11] Act XV. of 1916.

Government was required once for all[1] to appoint committees of three or more persons to exercise the powers[2] given to the Board of Revenues and local agents by the above Regulations.[3]

As to the duties and powers of such committees, see *post*, pp. 589, 590.

"It cannot be contended that, owing to the neglect of Government to carry out the duties imposed upon them by s. 7 of that Act, the Board of Revenue can be deemed to be still invested with the powers and duties which attached to the Board under the Regulations." [4]

Two out of three of the members of a committee so appointed cannot maintain a suit,[5] but a surviving member can do so.[6]

The members of the said committee were to be appointed from among persons professing the religion for the purposes of which the mosque, temple, or other religious endowment was founded, or was then maintained, and in accordance, so far as could be ascertained, with the general wishes of those who were interested in the maintenance of such mosque, temple, or other religious establishment. The appointment of the committee was to be notified in the *Official Gazette*. In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government might cause an election to be held under such rules (not inconsistent with the provisions of this Act) as should be framed by such Local Government.[7]

Qualifications for members of such Committee.

Under s. 9 every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court as thereinafter provided.[8]

Every member to be appointed for life unless removed for misconduct, etc.

A member of a committee can retire from his office of his own will.[9]

Retirement of member.

Section 10.—Whenever any vacancy shall occur among the members of a committee appointed as above, a new member

Provisions for filling up vacancies.

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years, *Ponduranga* v. *Nagappa* (1889), 12 Mad. 366; *Bhima Rout* v. *Dasarathi Doss* (1912), 40 Calc. 323, at p. 333.

[1] *Rangappa* v. *Bhimappa* (1915), 39 Mad. 349. As to a change for Revenue purposes, see *ibid.*

[2] *Ante*, pp. 582, 583.

[3] S. 7. As to giving consideration in return for votes, see *Krishnaswami Ayyangar* v. *Sivaswami Udayar* (1905), 29 Mad. 188.

[4] *Mahomed* v. *Ganapati* (1889), 13 Mad. 277, at pp. 278, 279.

[5] *Muhammad Hasan (Syed)* v. *Nazar Muhammad (Kazi)* (1916), 1 Pat. L. J. 437.

[6] *Raghunandan Ramanuja Das* v. *Bibhuti Bhusan Mukerjee* (1911), 39 Calc. 304, differing from *Samthalva* v. *Manjanna Shetty* (1910), 34 Mad. 1.

[7] Act XX. of 1863, s. 9. See standing orders of Madras Board of Revenue, Vol. I. chap vi.

[8] *Post*, p. 591.

[9] *Tiruvengada Ayyangar* v. *Rangayyangar* (1882), 6 Mad. 114.

has the effect, in the case of each daughter who marries under eighteen, of substituting for the absolute bequest to her a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(*d*) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void."

This section was held to be inoperative in the case of Hindu wills, even if they be governed by the Hindu Wills Act.

The section contemplates a form of disposition extending further in time than that allowed by the Hindu Law. In the case of all Hindu wills, whether they be or be not governed by the Hindu Wills Act, no bequest in favour of a person not in existence at the time of the testator's death was valid, whether it did or did not comprise the whole of the remaining interest of the testator in the thing bequeathed.

Rule against perpetuity.

Section 101. "No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(*a*) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of twenty-five. A and B survive the testator. Here the son of B who shall first attain the age of twenty-five, may be a son born after the death of the testator; such son may not attain twenty-five until more than eighteen years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B, and the minority of the sons of B. The bequest after B's death is void.

(*b*) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of his sons as shall first attain the age of twenty-five. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain twenty-five necessarily falls within his own lifetime. The bequest is valid.

(*c*) A fund is bequeathed to A for his life, and after his death to B for

his life, with a direction that after B's death it shall be divided among such of B's children as shall attain the age of eighteen; but that if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of eighteen years from the death of B, a person living at the testator's decease. All the bequests are valid.

(*d*) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of eighteen. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than eighteen years from the death of the daughter whose share it was. All these provisions are valid."

Religious and charitable endowments.

Although there are the above restrictions in the case of gifts or bequests to persons not in existence at the time of the gift or unborn at the time of the death of the testator, there is nothing to prevent a devise,[1] or a charge[2] in favour of the service of an idol,[3] or for the endowment of a temple, or for the maintenance of private or public religious ceremonies or worship,[4] or for charitable purposes,[5] or an endowment for the benefit of the public in the advancement of religion, knowledge,[6]

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[1] *Kallyprosono Mitter* v. *Gopeenath Kur* (1880), 7 C. L. R. 241; *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106; *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (*Mussamut*) (1871), 14 M. I. A. 289; 17 W. R. C. R. 41; *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (1905), 9 C. W. N. 528. See Phillips' and Trevelyan's "Hindu Wills," 2nd ed., pp. 35–39, and *post*, p. 548.

[2] *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1879), 6 I. A. 182; 5 Calc. 438; 5 C. L. R. 296; *Sonatun Bysack* v. *Juggutsoondree Dossee* (*Sreemutty*) (1859), 8 M. I. A. 66.

[3] It was held that a devise in a will to an idol which has not been consecrated was invalid in *Upendra Lal Boral* v. *Hemchundra Boral* (1897), 25 Calc. 405; 2 C. W. N. 295; *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (1901), 29 Calc. 260; 6 C. W. N. 267, and *Nogendranandini Dassi* v. *Benoy Krishna Deb* (1902), 30 Calc. 521; 7 C. W. N. 121 A Full Bench of the Calcutta High Court has now held that such devise is valid, *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (1909), 37 Calc. 128; 14 C. W. N. 18, followed in *Mohar Singh* v. *Het Singh* (1910), 32 All. 337, and in *Chatarbhuj* v. *Chatarjit* (1911), 33 All. 253. A bequest in favour of an unnamed deity is void for uncertainty; *Phundan Lal* v. *Arya Prithi Nidhi* (1911), 33 All. 739; see *post*, p. 550.

[4] *Mohar Singh* v. *Het Singh* (1910), 32 All. 337; *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (1878), 4 Calc. 443; 1 C. L. R. 566; *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (1905), 9 C. W. N. 528; *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112, at p. 127; *Khusalchand* v. *Mahadevgiri* (1875), 12 Bom. H. C. 214.

[5] See Phillips' and Trevelyan's "Hindu Wills," 2nd ed., pp. 35–39. *Post*, chap. xix.

[6] As to a University, *Manorama Dassi* v. *Kali Charan Banerjee* (1903), 31 Calc. 166; 8 C. W. N. 273. The endowment of the Tagore Law Professorship is an instance of this, *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol.

commerce, health,[1] safety, or any object beneficial to mankind.[2]

A grant to individuals is not exempt from the rule as to perpetuities although it may be actuated by religious motives.[3]

As to gifts and devises for religious or charitable purposes, see *post*, p. 548.

Joint gift.

"If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable of taking shall take the whole." [4]

Appointment.

Provided that it do not offend against the above rules as to perpetuities,[5] the Hindu law permits a power of appointment.[6]

Perpetuities.

Save so far as he can provide for religious and charitable endowments, a Hindu testator cannot create a perpetuity or limit for an indefinite period the enjoyment of the profits of his property.[7]

Settled estates in Bengal and Oudh.

So far as family settlements in Bengal and Oudh are concerned the doctrine that there can be no gift to a person not in being at the time of the gift has to some extent been modified by the Bengal Settled Estates Act,[8] and the Oudh Settled Estates Act,[9] respectively, which permit under certain conditions a settlement of property for three generations.

Trusts valid for valid purposes.

V. "Property, whether movable or immovable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases," but trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests

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47; 9 B. L. R. 377; 18 W. R. C. R. 359.

[1] As to a Hospital, *Fanindra Kumar Mitter* v. *Administrator General of Bengal* (1901), 6 C. W. N. 321.

[2] Cf. Transfer of Property Act (IV. of 1882), s. 17.

[3] *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (1881), 4 Mad. 200.

[4] *Nandi Singh* v. *Sita Ram* (1888), 16 I. A. 44; 16 Calc. 677; Succession Act (X. of 1865), s. 93.

[5] *Ante*, pp. 537, 538.

[6] *Motivahoo* (*Bai*) v. *Mamoobai* (*Bai*) (1897), 24 I. A. 93; 21 Bom. 709; 1 C. W. N. 366; *Javerbai* v. *Kablibai* (1891), 16 Bom. 492, at pp. 498, 499; *Brij Lal* v. *Suraj Bikram Singh* (1912), 39 I. A. 150; 34 All. 405; 16 C. W. N. 745; 14 Bom. L. R. 827.

[7] *Sookhmoy Chunder Dass* v. *Monohurri Dasi* (*Srimati*) (1885), 12 I. A. 103; 11 Calc. 684; *Raikishori Dasi* v. *Debendranath Sircar* (1887), 15 I. A. 37, 15 Calc. 409; *Vullubhdas Damodhar* v. *Thucker Gordhandas Damodhar* (1890), 14 Bom. 360; *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (1903), 7 C. W. N. 688; in *Asima Krishna Deb* (*Kumara*) v. *Kumara Krishna Deb* (*Kumara*) (1868), 2 B. L. R. O. C. 11, a trust for the accumulation for ninety-nine years of the surplus income of an estate was held to be void. See *ante*, pp. 533–538.

[8] Ben. Act III. of 1904.

[9] Act II. (U. P.) of 1900.

which the law recognizes.[1] After the determination of those interests the beneficial interest in the residue of the property remains in the person who but for the will, would lawfully be entitled thereto.[2]

VI. It is competent to a Hindu to create a life estate, or successive life estates, or any other estate for a limited term.[3]

Gift over.

Before the passing of the Hindu Transfers and Bequests Act, 1914,[4] and the Hindu Disposition of Property Act, 1916,[5] a gift by will upon an event which was to happen, if at all, immediately at the close of a life in being would be good if the donee be in existence at the time of the death of the testator, but not otherwise.[6] On these conditions an estate could be devested.[7] Provided that the gift does not offend against the restrictions referred to in those Acts,[8] it would now be valid.

(For instance, a gift to A., and on the death of A. without issue to B.[9])

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1 *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at pp. 71, 72; 9 B. L. R. 377, at pp. 401, 402; 18 W. R. C. R. 359, at pp. 367, 368; *Krishnaramani Dasi (S. M.)* v. *Ananda Krishna Bose* (1869), 4 B. L. R. O. C. 231; *Rajender Dutt* v. *Sham Chund Mitter* (1880), 6 Calc. 106.

2 *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 72; 9 B. L. R. 377, at p. 402; 18 W. R. C. R. 359, at p. 368.

3 *Ibid.* I. A. Sup. Vol. 47, at p. 75; 9 B. L. R. 377, at p. 405; 18 W. R. C. R. at p. 369; *Tarakeswar Roy (Kumar)* v. *Shoshi Shikareswar (Kumar)* (1883), 10 I. A. 51; 9 Calc. 952; 13 C. L. R. 62; *Kristoromoney Dossee (Sreemutty)* v. *Norendro Krishna (Maharajah)* (1888), 16 I. A. 29; 16 Calc. 383; *Mahomed Shumsool Hooda (Moulvie)* v. *Shewukram* (1874), 2 I. A. 7; 14 B. L. R. 226; 22 W. R. C. R. 409. A mere right of residence was given in *Krishnanath Narayan* v. *Atmaram Narayan* (1891), 15 Bom. 543, and in *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112.

4 Act I. (M. C.) of 1914, *ante*, p. 536.

5 Act XV. of 1916, *ante*, pp. 536, 537.

6 *Kristoromoney Dossee (Sreemutty)* v. *Norendro Krishna Bahadoor (Maharajah)* (1888), 16 I. A. 29; 16 Calc. 383; *Tarakeswar Roy (Kumar)* v. *Shoshi Shikareswar (Kumar)* (1883), 10 I. A. 51; 9 Calc. 92; 13 C. L. R. 62; *Ram Lal Mookerjee* v. *Secretary of State* (1881), 8 I. A. 46; 7 Calc. 304; 10 C. L. R. 349; *Soorjeemoney Dossee (Sreemutty)* v. *Denobundoo Mullick* (1862), 9 M. I. A. 123, at explained in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872), I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. C. R. 359 (see observations of James, L.J., at p. 381, and of Sir L. Peel at p. 383 of 9 B. L. R.); *Bilaso* v. *Munnilal* (1911), 33 All. 558, following *Bhagabati Barmanya* v. *Kali Charan Singh* (1911), 38 I. A. 54; 38 Calc. 468; 15 C. W. N. 393; 13 Bom. L. R. 375. See Indian Succession Act (X. of 1865), ss. 118–124, applied to certain Hindu Wills (*post*, p. 545) by the Hindu Wills Act (XXI. of 1870), s. 2.

7 *Ibid.*

8 *Ante*, pp. 536, 538.

9 *Lakshminarayana Nainar* v. *Valliammal* (1910), 34 Mad. 250; *Soorjeemoney Dossee* v. *Denobundho Mullick* (1857), 6 M. I. A. 526; (1862), 9 M. I. A. 123; *Bhoobun Mohinee*

Accumulations.

As to the provisions of those enactments see *ante*, pp. 536–538, the question how far, if at all, a Hindu can by will direct the accumulation of the profits of his property is not definitely settled.

It is apparently allowable for the period of a life in being, and the attainment of majority of the beneficiary, after the close of such life in being.

In *Amrito Lall Dutt* v. *Surnomoye Dassee* (1897),[1] Mr. Justice Jenkins held "that it was not incompetent for a Hindu, with proper limitations, to direct an accumulation of the income of property which, under his will, vests in his executors or trustees," and that "in the absence of special provision the limit must be that which determines the period during which the course of devolution of property can be directed or controlled by a testator." On appeal [2] the question did not arise, but one of the judges of the Calcutta High Court [3] dissented from the above view. In another case arising out of the same will, Mr. Justice Woodroffe inclined to the opinion that accumulations were not valid beyond the minority of the devisee,[4] and Mr. Mayne [5] inclined to the view that accumulations are not permissible. A more recent Calcutta decision supports Mr. Justice Jenkins' view.[6]

In *Nafar Chandra Kundoo* v. *Ratan Mala Debi*, [1910] 15 C. W. N. 66, the Court upheld a direction to accumulate income for the marriage expenses of a son, and in Bombay a direction to accumulate for sixteen years has been upheld.[7]

Hindu Wills Act.

The Hindu Wills Act [8] has applied certain of the sections of the Indian Succession Act (X. of 1865) to the attestation, revocation, revival, interpretation, and probate of wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on and after the 1st September, 1870, within the territories subject to the Lieutenant-Governor of Bengal, or the local limits of the ordinary original civil jurisdiction of the High Courts of Madras or Bombay,[9] and in the case of such wills and codicils

Application of Act.

Debya v. *Hurrish Chunder Chowdhry* (1878), 5 I. A. 138; 4 Calc. 23; 2 C. L. R. 339.

[1] 24 Calc. 589; 1 C. W. N. 345.

[2] (1898) 25 Calc. 662; 2 C. W. N. 389; (1900) 27 I. A. 128; 27 Calc. 996; 4 C. W. N. 549; 2 Bom. L. R. 446.

[3] (1898) 25 Calc. at pp. 690, 691; 2 C. W. N. at pp. 395, 396.

[4] *Ranee Money Dassee (Sreemutty)* v. *Premmoney Dassee (Sreemutty)* (1905), 9 C. W. N. 1033, at p. 1043.

[5] "Hindu Law," 8th ed., p. 583–586, see *ante*, p. 362.

[6] *Rajendra Lall Agarwalla* v. *Rajcoomari Debi* (1906), 34 Calc. 5; 11 C. W. N. 65.

[7] *Jamnabai* v. *Dharsey* (1902), 4 Bom. L. R. 803.

[8] Act XXI. of 1870.

[9] Wherever the property be situate, *Ravji Ranchod Naik* v. *Vishnu Ranchod Naik* (1884), 9 Bom. 241.

made outside those limits, so far as relates to immovable property situated within those territories or limits.[1]

The Act provides [2] that marriage shall not revoke any such will or codicil,[3] and that nothing therein contained shall authorize a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any person of any right of maintenance of which, but for s. 2 of the Act, he could not deprive him by will. Provisos.

And that nothing therein contained shall affect any law of adoption or intestate succession, and that nothing therein contained shall authorize any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the 1st of September, 1870.

The word "interest" in this proviso has been held by more than one decision to include not only the extent or duration of the estate given, but also the capacity of the donee to take,[4] and thereby to apply to wills governed by the Hindu Wills Act the rule [5] prohibiting devises to a person who is unborn at the date of the death of the testator. The effect of these decisions was to render inoperative in the case of Hindu wills ss. 99–101 of the Indian Succession Act [6] which have been expressly applied by the Act to Hindu Wills. Should the question come before the Judicial Committee that Board may take the view that effect must be given to all the sections of the Indian Succession Act [7] which have been applied, and that the word "interest" does not include "capacity to take." [8] This question does not arise in the cases to which recent enactments (*ante*, pp. 536–538) apply. Interest.

Under the Hindu Wills Act [9] every testator must execute his will according to the following rules :— Execution of wills.

First.—The testator shall sign [10] or affix his mark to the will,[11]

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[1] For an instance of a will, which in respect of some property was governed by the Hindu Wills Act, and which in respect of other property was not so governed, see *Jairam Narronji* v. *Kuverbai* (1885), 9 Bom. 491.

[2] S. 3.

[3] In the case of a will not subject to the Hindu Wills Act, marriage does not revoke a will.

[4] *Alangamanjori Dabee* v. *Sonamoni Dabee* (1882), 8 Calc. 637; 10 C. L. R. 459; *Callynath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (per Pontifex, J.) (1882), 8 Calc. 378, at p. 390; 10 C. L. R. 207, at p. 215; *Radha Prasad Mallick* v. *Ranimoni Dasi* (1910), 38 Calc. 188; 15 C. W. N. 113; *Jairam Narronji* v. *Kuverbai* (1885), 9 Bom. 491, at p. 506.

[5] *Ante*, pp. 533, 534.

[6] Act X. of 1865.

[7] *Ibid.*

[8] Cf. *Norendranath Sircar* v. *Kamalbasini Dasi* (1896), 23 I. A. 18; 23 Calc. 563; *Bank of England* v. *Vagliano* (1891), A. C. 107.

[9] Act X. of 1865, s. 50, applied by Act XXI. of 1870, s. 2.

[10] The place of signature seems to be immaterial, see *In the goods of Porthouse* (1897), 24 Calc. 784.

[11] Affixing a mark by the direction of the testator is not sufficient: *Radhakrishna Mudaliar* v. *Subraya Mudaliar* (1916), 31 Mad. L. J. 357.

or it shall be signed by some other person in his presence and by his direction.[1]

Second.—The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall show that it was intended thereby to give effect to the writing as a will.

Third.—The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the will in the presence of[2] the testator, but it is not necessary that more than one witness be present at the same time, and no form of attestation is necessary.

The witness must sign as such. His signature written as the name of the person who signed the will for the testator does not amount to an attestation of the will.[3] The witness must sign. It is not sufficient that he should affix a mark,[4] but his full signature is not necessary. The placing of his initials is sufficient.[5]

The attesting witnesses must sign the will after the testator has executed it.[6]

It is not necessary that the attesting witnesses should see the testator sign the will, or should observe any signature on the paper which they attest, provided that the testator's signature was on the will when the witnesses attested it, and that the testator makes them understand that the paper which they attest is his will.[7]

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[1] The execution of a will by the impression of a stamp complies with the section, *Nirmal Chunder Bandopadhya* v. *Saratmoni Debya* (1898), 25 Calc. 911 ; 2 C. W. N. 642.

[2] This means "in sight of," see *Esaias* v. *Gabriel* (1871), 3 N. W. P. 32. In the case of the execution of a will by a *purdahashin* lady the attestation by the Registrar, who was in the verandah outside the room in which she sat, and whom she could have seen if she liked, was held sufficient, *Horendranarain Acharji Chowdhry* v. *Chandra Kanta Lahiri* (1888), 16 Calc. 19.

[3] *In the matter of the petition of Hemlota Dabee* (1882), 9 Calc. 226 ; S. C. *Grish Chunder Banerjee* v. *Hemlota Debi*, 11 C. L. R. 359.

[4] *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (1885), 11 Calc. 429 ; *Fernandez* v. *Alves* (1879), 3 Bom. 382. These authorities were questioned in *Ammayee* v. *Yalumalai* (1891), 15 Mad. 261.

[5] *Ammayee* v. *Yalumalai* (1891), 15 Mad. 261.

[6] *In the matter of the petition of Hurrosundari Dabia* (1880), 6 Calc. 17 ; 6 C. L. R. 303 ; *Bissonath Dinda* v. *Doyaram Jana* (1880), 5 Calc. 738 ; 5 C. L. R. 565 ; *Fernandez* v. *Alves* (1879), 3 Bom. 382 ; *Khuttun Kooer (Mussamut)* v. *Poona Kooer (Mussamut)* (1875), 24 W. R. C. R. 322.

[7] *Manickbai* v. *Hurmasji Bomanji* (1877), 1 Bom. 547 ; *Amarendra Nath Chatterjee* v. *Kashi Nath Chatterjee* (1899), 27 Calc. 169.

An endorsement by the Registrar to the effect that the testator admitted to him the execution of the will is a good attestation.[1]

Effect can be given to a legacy to an attesting witness.[2]

The following are the sections of the Indian Succession Act [3] which have been applied by s. 2 of the Hindu Wills Act [4] (as altered by the Probate and Administration Act [5]) to the above-mentioned Hindu Wills, viz. :— Portions of Succession Act applied to Hindu Wills.

Sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive), sections 82, 83, 85, 88 to 103 (both inclusive), sections 106 to 177 (both inclusive), and section 187.

The Probate and Administration Act [6] provides for the grant of probate of wills and letters of administration to the estates of (amongst other persons) all Hindus.[7] Probate and Administration Act.

Under that Act [8] the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.[9] Before the passing of the Hindu Wills Act the estate of a deceased Hindu did not vest in the executor, even if probate had been granted to him.[10] He was practically a manager.[11]

The Malabar Wills Act [12] declares the testamentary power of, and provides rules for the execution of wills and codicils by, persons governed by the Marumakkatayam or the Aliyasantana law of inheritance. The effect of that Act is to place such persons to the extent of the matters dealt with in the Act, in the same position as persons governed by the Hindu Wills Act. Malabar law.

Sections 49, 50, 51, 54, 55, and 57 to 77 (both inclusive), and sections 82, 83, 85, and 88 to 98 (both inclusive) of the Indian Succession Act [13] apply to wills and codicils made by Oudh taluqdars.[14] Oudh taluqdars.

As to the construction of Hindu wills, see Phillips and Trevelyan's "Hindu Wills," 2nd ed., chap. iv.

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[1] *Horendranarain Acharji Chowdhry* v. *Chandra Kanta Lahiry* (1888), 16 Calc. 19; *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (1885), 11 Calc. 429; *In the matter of the petition of Hurrosundari Dabia* (1880), 6 Calc. 17; 6 C. L. R. 305; *In the goods of Roymonee Dossee* (1875), 1 Calc. 150.

[2] Cf. s. 54 of the Indian Succession Act (X. of 1865), which has not been applied to Hindu wills.

[3] Act X. of 1865.

[4] Act XXI. of 1870.

[5] Act V. of 1881, s. 154.

[6] Act V. of 1881.

[7] This includes Sikhs, see *Bhagwan Koer (Rani)* v. *Jogendra Chandra Bose* (1903), 30 I. A. 249; 31 Calc. 11; 7 C. W. N. 895; 5 Bom. L. R. 845. As to what are "Hindus," see *ante*, pp. 22–26.

[8] S. 4.

[9] See Phillips and Trevelyan's "Hindu Wills," 2nd ed., pp. 169, 170.

[10] *Kherodemoney Dossee* v. *Doorgamoney Dossee* (1878), 4 Calc. 455, at p. 468; 3 C. L. R. 315, at p. 327; *Maniklal Atmaram* v. *Manchersi Dinsha Coachman* (1876), 1 Bom. 269; *Jaykali Debi (Srimati)* v. *Shibnath Chatterjee* (1866), 2 B. L. R. O. C. 1; *Sharo Bibi* v. *Buldeo Das* (1867), 1 B. L. R. O. C. 24.

[11] *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (1897), 25 Calc. 103.

[12] Mad. Act V. of 1898.

[13] Act X. of 1865.

[14] Act I. of 1869, s. 19.

CHAPTER XIX.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

THERE are in India a large number of endowments for religious, charitable, educational, or public purposes.

Object of endowment.

The objects of such endowments are various. An endowment may be in favour of an idol, or for the endowment of a temple, or for the maintenance of private or public religious ceremonies or worship, or for charitable purposes, or for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any object beneficial to mankind.[1]

Gifts for religious and charitable purposes have always been common in India, under rulers of various races and creeds. Such gifts were made by sovereigns and subjects alike; and out of the public revenue as well as out of private property.[2]

In many of these gifts the giver participated in the enjoyment of the property along with the objects of his devotion; sharing, for instance, in the *prasád*,[3] or offerings to the deity—as the worshipper participated in the sacrifice, receiving back a portion of his offering as consecrated. He also ordinarily retained the right of superintendence of property dedicated.[4]

The sanctity of such gifts enabled proprietors to screen their property from spoliation by dedicating it; and, in many cases, to retain the enjoyment of it under the cloak of a dedication which was only nominal. Moreover, the permanence of endowments offered a congenial mode of keeping intact family property which would otherwise have been liable to disintegration. Among primitive races it seems to have been felt that, so long as property was first dedicated to God, there was no objection to the beneficial enjoyment and control of it by the giver to an indefinite extent. Whatever may have been the feelings at work, it seems clear that the ostensible consecration of property was in India freely resorted to for the purpose of withdrawing it alike from the grasp of the oppressor and from the disintegrating action of the ordinary rules affecting it.[5]

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[1] Cf. Transfer of Property Act (IV. of 1882), s. 117.

[2] See Phillips' "Land Tenures of Lower Bengal" (Tagore Lectures, 1875), p. 214.

[3] See *Kamini Debi* (*Srimati*) v. *Asutosh Mookerjee* (1888), 15 I. A. 159; 16 Calc. 103.

[4] *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee* (1889), 16 I. A. 137; 17 Calc. 3.

[5] Phillips and Trevelyan's "Hindu Wills," 2nd ed., pp. 36, 37.

It was at one time contended that trusts for Hindu religious purposes could not be recognized by the Courts, on the ground that they were illegal as being superstitious. The contention was, however, rejected.[1] Without a trust an endowment could not have any permanent effect.[2] Trusts.

The consent of the State is not necessary for the creation of an endowment.[3] Consent of State.

It is competent to the Civil Courts to determine rights of management of such endowments, and rights to hold offices thereunder, to interfere to protect the property of such endowments, to construe and preserve the schemes thereof and generally to decide questions which may arise in relation to the due performance of the trusts of the endowments.[4] Powers of Courts.

A suit will lie to determine the rights of individuals or classes of individuals to worship in a particular temple or to exclude them from so worshipping.[5] Worship.

The Courts cannot deal with questions relating to worship in temples situate outside British India.[6]

It has been held in Madras [7] that s. 4 of the Pensions Act, 1871,[8] which enacts "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted," has no application to religious and charitable endowments, but an opposite view has been maintained in Bombay.[9] Pensions Act.

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[1] *Advocate General* v. *Vishvanath Atmaram* (1855), 1 Bom. H. C. App. ix. See *Khusalchund* v. *Mahadevgiri* (1875), 12 Bom. H. C. 214; *Krishnaramani Dasi* (*S.M.*) v. *Ananda Krishna Bose* (1869), 4 B. L. R. O. C. 231, at p. 287. Cf. *Merces* v. *Cones* (1864), 2 Hyde, 65.

[2] *Krishnaramani Dasi* (*S.M.*) v. *Ananda Krishna Bose* (1869), 4 B. L. R. O. C. 231, at p. 285.

[3] *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (*Mussumat*) (1871), 14 M. I. A. 289, at pp. 301, 302; 10 B. L. R. 19, at p. 31; 17 W. R. C. R. 41, at p. 43.

[4] *Ante*, pp. 5–8. See Act V. of 1908 (Civil Procedure Code), s. 9. As to a suit for a declaration that a mohunt has not been duly appointed, see *post*, p. 572.

[5] See *Sankaralinga Nadan* v. *Rajeswari Dorai* (*Raja*) (1908), 35 I. A. 176; 31 Mad. 236; 12 C. W. N. 946.

[6] *Trimbak* v. *Lakshman* (1895), 20 Bom. 495.

[7] *Venkateswari Aiyar* v. *Secretary of State* (1907), 31 Mad. 12; *Secretary of State* v. *Abdul Hakkim Khan* (1880), 2 Mad. 294; *Kolandai Mudali* v. *Sankara Bharadhi* (1882), 5 Mad. 302; *Subramanya Ayyar* v. *Secretary of State* (1883), 6 Mad. 361; *Athavulla* v. *Gouse* (1888), 11 Mad. 283.

[8] XXIII. of 1871.

[9] *Miya* v. *Bava Sahab Santi Miya* (*Sayad*) (1896), 22 Bom. 496; *Vyanji* v. *Sarjarao Apajirao* (1891), 16 Bom. 537. See *Maharaval Mohansingji Jeysingji* v. *Government of Bombay* (1881), 8 I. A. 77; 5 Bom. 408.

Creation of Endowment.

Mode of creation of endowment.

The endowment may be created by grant or by will, or in any other way by which property may be transferred.

Conditions of validity.

In order to constitute a valid endowment all that is necessary is to set apart specific property for specific purposes, and where these purposes are clearly religious or charitable in their nature [1] the trust is not invalid because it transgresses against the rule which forbids the creation of a perpetuity.[2]

No express words are necessary,[3] nor is an express trust necessary.[4]

Perpetuity.

To be valid an endowment must be created in perpetuity for religious or charitable purposes.

"It appears therefore to their Lordships upon the authority of that case,[5] and upon the principle of endowments, that this was not an endowment by the Maharajah in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever, and that nobody could alienate it. Suppose the Maharajah had established the idol in his house, would anybody pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house notwithstanding he had put an idol there; and what would become of the idol itself? Here there was no endowment, no priest, no public, no one legally interested in the worship of this idol, except the Maharajah himself, and nothing to show that the Maharajah intended to establish it for the benefit of his sons or heirs, or anybody else in perpetuity." [6]

Divesting of interest of endower.

The endower must divest himself of all beneficial interest in the property dedicated to the endowment.

Mr. Mayne said that the trust is imperfect "where the founder applies his own property to the creation of a pagoda, or any other religious or charitable foundation, keeping the property itself and the control of it absolutely in his own hands. The community may be greatly benefited by this arrangement, so long as it lasts, but its continuance is entirely at his own pleasure. It is like a private chapel in a gentleman's park, and

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[1] *Ante*, pp. 539, 540.

[2] *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (1905), 9 C. W. N. 528, at p. 535; *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112, at pp. 126, 127.

[3] *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112, at p. 127.

[4] *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 12 Bom. 247, at p. 263.

[5] *Mahatab Chand* v. *Mirdad Ali* (1833), 5 Ben. Sel. R. 268 (new edition, 313).

[6] *Brojosoondery Debia* (*Maharanee*) v. *Luchmee Koonwaree* (*Ranee*) (1873), 15 B. L. R., note to p. 176, at p. 178; 20 W. R. C. R. 95, at p. 96. See *Madhub Chandra Bera* v. *Sarat Kumari Debi* (1910), 15 C. W. N. 126;

the fact that the public have been permitted to resort to it will not prevent its being closed or pulled down, provided there has been no dedication of it to the public. It will pass equally unencumbered to his heirs, or to his assignees in insolvency. He may diminish the funds so appropriated at his pleasure, or absolutely cease to apply them to the purpose at all. In short, the character of the property will remain unchanged, and its application will be at his own discretion."[1]

Charge on property.

It is not necessary that there be a complete dedication and that the whole ownership in the property should be transferred. A trust for an endowment may be created by a charge upon the property or an appropriation of a portion of the income.[2]

In that case the property can be dealt with,[3] is partible,[4] and descends subject to the charge. The interest subject to the charge can be attached and sold.[5]

In one case where the property was granted for the maintenance of a *mutt* (monastery) and the charities connected with it, the remainder of the profits to be applied to the maintenance of the grantee or his descendants, the Court upheld an assignment of property for such maintenance for the life of the assignee, who was a member of the family, but for no longer.[6]

Easement.

A mere easement may be created for a charitable or religious purpose.

For instance, a right to use a *ghat* to which persons on the point of death are removed.[7]

Future operation.

There is no objection to an endowment coming into operation at a future time, as, for instance, after a life estate.[8]

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[1] "Hindu Law," 8th ed., p. 598. See *Brojosoondery Debia (Maharanee)* v. *Luchmee Koonwaree (Ranee)* (1873), 15 B. L. R. 176, note; 29 W. R. C. R. 95.

[2] See *Sonatun Bysack* v. *Juggutsoondree Dossee* (1859), 8 M. I. A. 66; *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1879), 6 I. A. 182; 5 Calc. 438; 5 C. L. R. 296; *Jagadindra Nath Roy Bahadur (Maharajah)* v. *Hemanta Kumari Debi (Rani)* (1904), 31 I. A. 203, at pp. 209, 219; 32 Calc. 129, at pp. 140, 141; 8 C. W. N. 809, at p. 820; 6 Bom. L. R. 765; *Sakrappa* v. *Shivappa* (1910), 35 Bom. 153; 12 Bom. L. R. 584; *Kulada Prosad Deghoria* v. *Kali Das Naik* (1914), 42 Calc. 536; 19 C. W. N. 542.

[3] *Basoo Dhul* v. *Kishen Chunder Geer Gosain* (1870), 13 W. R. C. R. 20; *Futtoo Bibee* v. *Bhurrut Lall Bhukut* (1868), 10 W. R. C. R. 299; see *Jadubindu Odhikaree* v. *Lokenauth Geree* (1863). Marsh, 303; 2 Hay, 160.

[4] *Ram Coomar Paul* v. *Jogender Nath Paul* (1878), 4 Calc. 56; 2 C. L. R. 310; *Suppammal* v. *Collector of Tanjore* (1889), 12 Mad. 387, at p. 391.

[5] *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1879), 6 I. A. 182; 5 Calc. 438; 5 C. L. R. 296; *Sakrappa* v. *Shivappa* (1910), 35 Bom. 153; 12 Bom. L. R. 584.

[6] *Sathianama Bharati* v. *Saravanabagi Ammal* (1894), 18 Mad. 266.

[7] *Jaggamoni Dasi* v *Nilmoni Ghosal* (1882), 9 Calc. 75; 11 C. L. R. 502.

[8] *Gobind Prasad* v. *Gomti* (1908), 30 All. 288.

Certainty.

An endowment must be certain both as to its subject-matter and as to its object;[1] but it is unnecessary that a testator should fix the exact amount to be expended. If he supplies a measure of the bequest, the Court will ascertain how much should be applied, and will fix a scheme.[2]

Dharm. Sarakum.

A gift to trustees for use as "dharm,"[3] or in "sarakam,"[4] or for purposes of popular usefulness or for purposes of charity[5] has been held to be invalid as being too indefinite. As to a gift to an idol, see *ante*, p. 539, note 3.

In the following cases the bequest has been held to be sufficiently definite:—

"Charitable purposes."

A settlement to the extent of Rs. 500 a month to be applied to "charitable purposes" at a dharamsala which the testator had founded.[6]

Feeding Hindus.

The creation of a fund the income of which was to be spent in perpetuity in feeding indigent Hindus at the outer gate of the testator's house.[7]

"*Sadavarat.*"

A direction that certain rents be used "for *sadavarat*"[8] where from the will it appeared that the testator intended his executors to establish a definite *sadavarat* in some definite place.[9]

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[1] See Indian Succession Act (X. of 1865), s. 76, applied to certain Hindu wills (*ante*, p. 545), by the Hindu Wills Act (XXI. of 1870), s. 2.

[2] See *Krishnaramani Dasi* (*S. M.*) v. *Ananda Krishna Bose* (1869), 4 B. L. R. O. C. 231. As to the settlement of a scheme, see *post*, p. 554.

[3] "Law, virtue, legal or moral duty," Wilson's "Glossary," p. 137; *Runchordas Vandrawandas* v. *Parvatibai* (1899), 26 I. A. 71; 23 Bom. 725; 3 C. W. N. 621; 1 Bom. L. R. 607; *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1912), 40 Calc. 232; *Parthasarathy Pillai* v. *Thiruvengada Pillai* (1907), 30 Mad. 340. In the last-named case Subrahmania Ayyar, J., held that the word "*dharman*," when used in connection with gifts of property by a Hindu, has a perfectly well-settled meaning, and denotes objects indicated by the terms "*ishta*" and "*poorta*" (sacrifices and charities). He held that the word is a compendious term, and is not a mere vague and uncertain expression (see Mandlik's "Vyavahara Mayukha," pp. 333 *et seq.*, and Pundit Prannath Saraswati's "Hindu Law of Endowments," pp. 18 *et seq.*); but this view is, it is submitted, inconsistent with the decision in *Runchordas Vandrawandas* v. *Parvatibai* (above). See also *Motivahu* (*Bai*) v. *Mamubai* (*Bai*) (1895), 19 Bom. 647; *Devshankar Neranbhai* v. *Motiram Jageshvar* (1893), 18 Bom. 136; *Morarji Cullianji* v. *Nenbai* (1892), 17 Bom. 351; *Gangbai* v. *Thavur Mulla* (1863), 1 Bom. H. C. 71; *Advocate-General* v. *Damothar* (1852), Perry's "Oriental Cases," 526; *Sib Chunder Mullick* v. *Trepoorah Soondary Dossee* (1842), Fulton, 98, 109.

[4] Good works; *Bapi* (*Bai*) v. *Jamnadas Hathisang* (1897), 22 Bom. 774.

[5] *Trikumdas Damodhar* v. *Haridas Morarji* (1907), 31 Bom. 583; 9 Bom. L. R. 560; *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1912), 40 Calc. 232.

[6] *Gordhan Das* v *Chunni Lal* (1907), 30 All. 111.

[7] *Rajendra Lall Agarwalla* v. *Raj Coomari Debi* (1906), 34 Calc. 5.

[8] "Distribution of provisions daily to passers-by, mendicants and paupers." Wilson's "Glossary," p. 449.

[9] *Morarji Cullianji* v. *Nenbai* (1892), 17 Bom 351; *Jamnabai* v. *Khimji Vullubdass* (1889), 14 Bom. 1.

A direction that the executors should "get a Shiva's temple erected at a reasonable cost in a suitable place within the compound of the brick-built *bhaitakhana* house, inclusive of the building and garden thereto."[1] Shiva's temple.

A bequest to complete the building of a temple, and to instal and maintain an idol therein,[2] or to establish a *thakoor* (idol) at such place as the executor should think fit.[3] Temple.

A direction that certain properties should be placed in the hands of named persons who should spend the surplus income in the worship and sheba of Kali after establishing an image of the goddess.[4] Worship of *Kali.*

A direction to a trustee "to spend suitable sums at the annual *sradhs* or anniversaries of my father, mother, and grandfather, as well as of myself after my demise, for the performance of the ceremonies and the feeding of the Brahmins and the poor; to spend suitable sums for the annual contribution and gifts to the Brahmins, pundits holding *tolls* (native schools) for (diffusion of Sanskrit) learning in the country at the time of the Doorga Pujah; to spend suitable sums for the perusal of Mohabharat and Pooran, and for prayer to God during the month of Kartick. Should there be any surplus after the above expenditure, then I do hereby direct my trustee to spend the said surplus in the contribution toward the marriage of the daughters of the poor in my class and of the poor Brahmins and towards the education of the sons of the poor amongst my class, and of the poor Brahmins and other respectable castes as my trustee shall think fit to comply."[5] *Sradhs*, etc.

A direction to pay for the worship of Siva on the night called *Sivaratri*.[6] *Sivaratri.*

A bequest for the maintenance of an Anna Chatra.[7] *Anna Chatra.*

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[1] *Gokool Nath Guha* v. *Issur Lochun Roy* (1886), 14 Calc. 22. See *Ramtonoo Mullick* v. *Ramgopaul Mullick* (1829), 1 Knapp. 295. In a similar case where the amount to be expended was left to the absolute discretion of the executor the Court refused to give effect to the bequest, *Surbomungola Dabee* v. *Mohendronath Nath* (1879), 4 Calc. 508. This decision is not consistent with *Parbati Bibee (Musst)* v. *Ram Barun Upadhya* (1904), 31 Calc. 895; 8 C. W. N. 653, *post*, p. 552, note 1. See *Gangbai* v. *Thavar Moolla* (1863), 1 Bom. H. C. 73; *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1912), 40 Calc. 232.

[2] *Mohar Singh* v. *Het Singh* (1910), 32 All. 337.

[3] *Rojomoyee Dassee* v. *Troylucko Mohiney Dassee* (1901), 29 Calc. 260; 6 C. W. N. 267.

[4] *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (1909), 37 Calc. 128; 14 C. W. N. 18.

[5] *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (1878), 4 Calc. 443; 1 C. L. R. 566. On appeal the Court expressed a doubt as to whether the bequests to pundits holding tolls, and for the reading of the Mohabharat and Pooran and for prayer to God were valid, but it was unnecessary to decide the question. This case was followed in *Lakshmishankar* v. *Vaijnath* (1881), 6 Bom. 24, in which case the testator devised all his property to trustees, directing them to reduce it into money, and expend it in the performance of his funeral ceremonies, and in feeding Brahmins according to the custom of his caste. A direction to feed Brahmins on a certain day in the year was upheld in *Kedar Nath Dutt* v. *Atul Krishna Ghose* (1908), 12 C. W. N. 1083. A different view of a somewhat similar trust was expressed in *Sarat Chandra Ghose* v. *Pratap Chandra Ghose* (1912), 40 Calc. 232.

[6] *Kedar Nath Dutt* v. *Atul Krishna Ghose* (1908), 12 C. W. N. 1083.

[7] *Advocate-General* v. *Strangman* (1905), 6 Bom. L. R. 56.

A bequest to such religious and charitable purposes as the executor may think proper.[1]

Pujah.

A devise of certain house property first for the celebration of pujahs and the worship of an idol, and then that the children of the testator should be allowed to live there.[2]

Cypres doctrine.

As to the application of the *cypres* doctrine where there has been a failure of the charitable bequest, see *Mayor of Lyons* v. *Advocate-General of Bengal* (1875), 3 I. A. 32; 1 Calc. 303.

Endowment must be real.

The dedication to be effectual must be real, and not merely colourable. It cannot be created as a means of keeping property in a particular family,[3] and thus evading the rule [4] requiring a donee to be a person living at the time of the gift or of the death of the testator. It must be an absolute gift for a religious or charitable purpose, constituting the dedicated property inalienable.[5]

If it be a pretended endowment to prevent creditors obtaining relief against the property of their debtors, no effect can be given to it.[6]

The mere use of the word "debutter" (belonging to a deity) [7] or of a similar expresssion is not conclusive.

A deed of trust must be held to be nominal only when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust; [8] but if the trust has once been effectually created, the fact that the parties have omitted to carry out the conditions of the trust will not invalidate it,[9] or permit the founder to resume it as private property.[10] In

[1] *Parbati (Bibee)* v. *Ram Barun Upadhya* (1904), 31 Calc. 895; 8 C. W. N. 653, and cases there cited. *Contrâ Surbomungola Dabee* v. *Mohendronath Nath* (1879), 4 Calc. 508, and *Jamnabai* v. *Dharsey* (1903), 4 Bom. L. R. 893.

[2] *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112.

[3] *Promotho Dassee* v. *Radhika Persaud Dutt* (1875), 14 B. L. R. 175. Where there is a real dedication it is not vitiated by a provision that a portion of the proceeds be paid to members of the family who are managers of the endowment: *Jadu Nath Singh* v. *Thakur Sita Ranji* (1917), 21 C. W. N. 552.

[4] *Ante*, pp. 533–537.

[5] *Hara Sunder Majumdar* v. *Basunta Kumar Roy* (1904), 9 C. W. N. 154.

[6] *Ram Chandra Mukerjee* v. *Ranjit Singh* (1899), 27 Calc. 242, at pp. 249, 250.

[7] *Shama Charan Nandi* v. *Abhiram Goswami* (1906), 33 Calc. 511; 10 C. W. N. 738.

[8] *Roop Laul* v. *Lakshmi Doss* (1905), 29 Mad. 1; *Suppammal* v. *Collector of Tanjore* (1889), 12 Mad. 387. See *Madhub Chandra Bera* v. *Sarat Kumari Debi (Srimati Rani)* (1910), 15 C. W. N. 126.

[9] See *Suppammal* v. *Collector of Tanjore* (1889), 12 Mad. 387, at p. 391; *Gordhan Das* v. *Chunni Lal* (1907), 30 All. 111, at pp. 114, 115; *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (1871), 14 M. I. A. 289, at p. 306; 10 B. L. R. 19, at pp. 33, 34; 17 W. R. 41, at p. 44; *Madhub Chandra Bera* v. *Sarat Kumari Debi (Rani)* (1910), 15 C. W. N. 126; *Kasheshuree Dassee* v. *Krishnakaminee Dassee* (1863), 2 Hay, 557.

[10] *Gopeenath Chowdhry* v. *Gooroo Dass Surma* (1872), 18 W. R. C. R. 472; *Ram Narain Singh* v. *Ramoon Paurey* (1874), 23 W. R. C. R. 76; see *post*, p. 554. As to the power of

that case the persons interested must take steps to enforce the performance of the trust.[1]

The dedication must be clearly proved.[2]

Proof of dedication.

"Where the trust itself is one declared by word of mouth by a person at the point of death, and is in terms by no means clearly indicating an intention on the part of the donor to deprive his family of all substantial enjoyment of his property, the Court may fairly require the fullest proof in support of such a trust."[3]

"Before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given."[4]

A mere purchase of land in the name of an idol does not by itself create an endowment.[5]

Mode of dealing with property.

When the question is whether an alleged endowment is real or fictitious, the mode of dealing with the property by the donor and his successors is an important matter for consideration.[6] The application of the proceeds of property for the benefit of an endowment by the founder or his heir is evidence of the existence and of the *bonâ fide* character of the endowment,[7] but the mere fact that a portion of the profits of land has been used for the worship of an idol is not conclusive as to the existence of an endowment.[8] It is, however, a fact which may well be taken into consideration when the intention of the founder has to be gathered from an ancient document expressed[9] in ambiguous language.

Resumption proceeding.

An incidental decision as to the validity of a debutter grant in a resumption proceeding may be some evidence, at any rate, of a claim to such grant.[10]

Evidence of terms of endowment.

The terms of an endowment will ordinarily be ascertained from the instrument of creation, or if the creation be by word

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the members of a family to repudiate an endowment for a family idol, see *post*, p. 574.

[1] *Hemangini Dasi* v. *Nobin Chand Ghose* (1882), 8 Calc. 788; 11 C. L. R. 370; *Brojomohun Doss* v. *Hurrololl Doss* (1880), 5 Calc. 700; 6 C. L. R. 58; *Panchcowrie Mull* v. *Chumroolall* (1878), 3 Calc. 563; 2 C. L. R. 121; *Ramnarain Singh* v. *Ramoon Paurey* (1874), 23 W. R. C. R. 76.

[2] *Doorganath Roy (Konwur)* v. *Ramchunder Sen* (1876), 4 I. A. 52; 2 Calc. 341.

[3] *Bipro Prosad Mytee* v. *Kenae Doyee (Mussamut)* (1865), 3 W. R. C. R. 165, at p. 167; 5 W. R. C. R. 82.

[4] *Brojosoondery Debia (Maharanee)* v. *Luchmee Koonwaree (Ranee)* (1873), 15 B. L. R. 176, note; 20 W. R. C. R. 95.

[5] *Ibid.* See *Bipro Prosad Mytee* v. *Kenae Doyee (Mussamut)* (1865), 3 W. R. C. R. 165.

[6] *Ram Chandra Mukerjee* v. *Ranjit Singh* (1899), 27 Calc. 244, at p. 252; 4 C. W. N. 405, at p. 410.

[7] *Gunga Narain Sircar* v. *Brindabun Chunder Kur Chowdhry* (1865), 3 W. R. C. R. 142; *Muddun Lal* v. *Komal Bibee (Sreemutty)* (1867), 8 W. R. C. R. 42; *Madhub Chandra Bera* v. *Sarat Kumari Debi (Srimati Rani)* (1910), 15 C. W. N. 126.

[8] See *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (1872), 18 W. R. C. R. 399; *Narain Persad Mytee* v. *Roodur Narain Mungle* (1863), 2 Hay, 490. See *Doorganath Roy (Konwur)* v. *Ram Chunder Sen* (1876), 4 I. A. 52; 2 Calc. 341.

[9] *Abhiram Goswami* v. *Shyama Charan Nandi* (1909), 36 I. A. 148; 36 Calc. 1003; 14 C. W. N. 1.

[10] *Madhub Chandra Bera* v. *Sarat Kumari Debi (Srimati Rani)* (1910), 15 C. W. N. 126, explaining *Budh Singh Dhudhuria* v. *Niradburan Roy* (1905), 2 C. L. J. 431.

of mouth by the statement of the endower at the time of the creation. When the terms of the deed of endowment are ambiguous,[1] or where from lapse of time or for other reasons such evidence is not obtainable, the terms can be ascertained from the practice of the endowment, or from the practice of similar endowments.

The mode in which offices connected with an endowment have been held is evidence of the terms of the endowment.[2]

Settlement of scheme.

When a testator, having expressed a clear intention to create a trust, has failed to indicate the means by which the trust is to be carried out,[3] or when for other reasons it is necessary so to do,[4] the Court will settle a scheme for the management of a religious or charitable endowment.[5]

Such scheme should give due consideration to the established practice of the institution, to the position of persons connected with it, and the interests of the body of persons for whose benefit the trust was created.[6]

"The first thing to be done is to take an account of the trust property. Much must depend upon the result of that account. Until the trust funds are ascertained it seems impossible that any scheme can be settled." [7]

Variation of scheme.

A scheme passed by the Court is liable to variation for good cause shown,[8] but only by the Court which passed the scheme.[9]

The Privy Council will only interfere with a scheme framed by a High Court, if the discretion has been improperly exercised or the High Court has not given consideration to matters which ought to have been considered.[10]

Revocation of trust.

A founder or his descendants cannot revoke an endowment which has been validly created.[11]

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[1] *Kulada Prosad Deghoria* v. *Kalidas Naik* (1914), 42 Calc. 536; 19 C. W. N. 542.

[2] See *Nimaye Churn Pojaree* v. *Mooroolee Chowdhry* (1864), 1 W. R. C. R. 108.

[3] *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (1905), 9 C. W. N. 528.

[4] See *ante*, p. 550.

[5] *Prayaga Doss Jee Varu* v. *Tirumala Sriranga Charylu Varu* (1907), 34 I. A. 78; 31 Mad. 138; 11 C. W. N. 442; 9 Bom. L. R. 588; S. C. in Court below (1905), 28 Mad. 319; *Thackersey Dewraj* v. *Hurbhum Nursey* (1883), 8 Bom. 432.

[6] Cf. *Mahomed Ismail Ariff* v. *Ahmad Moolla Dawood* (1916), 43 I. A. 127.

[7] *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N. 23; 2 Bom. L. R. 510; S. C. in Court below (1887), *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*, 12 Bom. 247.

[8] *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharlavaru* (1905), 28 Mad. 319; S. C. on appeal (1907), 34 I. A. 78; 31 Mad. 138; 11 C. W. N. 442; 5 Bom. L. R. 588; *Damodarbhat* v. *Bhogilal Karsondas* (1899), 24 Bom. 45.

[9] *Umeschandra Datta* v. *Ravaneswar Prasad Singh* (1912), 17 C. W. N. 841.

[10] *Sevak Kirpashankar Daji* v. *Gopalrao Manshar Tambekar* (1912), 15 Bom. L. R. 13.

[11] *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (1871), 14 M. I. A. 289, at p. 302; 10 B. L. R. 19, at p. 31; 17 W. R. C. R. 41, at p. 43.

His sons acquire no right of inheritance to his adoptive father.[1]

If a husband and wife jointly adopt he inherits to both. If the husband adopts one son and the wife another, the sons inherit and offer oblations to each respectively.[2]

This kind of adoption is purely contractual. There is no fiction of a new birth into the adoptive family. The son adopted "does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance." [3]

He may perform the obsequies of his natural father or mother,[4] and also those of his adopters. He would apparently be in the same position as to rights of survivorship in ancestral property in his adoptive family as a natural-born son would be.[5]

EFFECTS OF INVALID ADOPTION.

Effect of invalid adoption.

Where there has been an adoption in form, but such adoption is for any reason invalid, the adopted son does not acquire any rights, as such, in the family of the person purporting to adopt him, except so far as he may be entitled to maintenance.[6]

Decrees against him, and acts by him, would not bind the estate.

The following are the cases of an invalid adoption :—

(i.) Where there is in existence a son begotten or adopted.[7]

(ii.) Simultaneous adoption of more than one son.[8]

(iii.) Adoption of the same boy by two persons.[9]

(iv.) Adoption by a woman without authority.[10]

(v.) Adoption of a boy of a different primary caste.[11]

(vi.) Adoption of a boy within the prohibited decrees.[12]

(vii.) Adoption of a boy where the performance of initiatory ceremonies or marriage before adoption makes the adoption invalid.[13]

Right of maintenance.

It is unsettled whether, on the adoption being set aside, the boy can revert to his natural family, and whether he has any right of maintenance in his adoptive family.

Tirhoot v. *Huropershad Mohunt* (1867), 7 W. R. C. R. 500.

[1] *Juswant Singh (Baboo)* v. *Doolee Chund* (1876), 25 W. R. C. R. 255. They would, of course, possess the ordinary rights of inheritance to property which was vested in their father.

[2] See answers of pundits in *Sreenarain Rai* v. *Bhya Jha* (1812), 2 Ben. Sel. R. 23, at p. 27 (new edition, 29, at p. 34); W. Macnaghten's "Hindu Law," vol. i. p. 101.

[3] Colebrooke's "Digest," vol. i. p. 276, n.; 1 W. Macnaghten's "Hindu Law," p. 76.

[4] See *Purmessur Dutt Jha (Chowdree* v. *Hunooman Dutt Roy* (1837), 6 Ben. Sel. R. 192 (new edition, 235, at p. 240).

[5] See Sarkar's "Law of Adoption," p. 451.

[6] *Ranjit Singh (Raja)* v. *Ram Chandra Mookerjee* (1899), 4 C. W. N. 415.

[7] *Ante*, pp. 103, 104.

[8] *Ante*, p. 149.

[9] *Ante*, p. 148.

[10] *Ante*, pp. 118, 119.

[11] *Ante*, p. 138.

[12] *Ante*, pp. 138–144.

[13] *Ante*, pp. 146, 147.

be brought or defended in the name of the idol.[1] It must be brought by the manager,[2]

Lost or broken idol.

"If the image is cracked, broken, mutilated, or lost it may be substituted by a new one duly consecrated.[3] Fresh consecration or substitution is also necessary if the image be polluted in any way. Removal from the temple amounts to pollution in the case of an image of Siva only in some cases. A new image cannot be substituted when the original one is free from any defect of the kind mentioned. Nor can the old image be replaced by a new one, by reason of the occurrence of any defect therein, such as cracking, when it is an ancient image believed to have been established by a God, or by a saint, or by an Asura,[4] or by a remote ancestor of a family, or when its origin is unknown. Nor is a new image necessary if it can be restored by rejoining its broken parts together, as when the same is metal, and a limb is severed. When an image is to be replaced by a new one, it must be done as soon as possible, for the damaged image ceases to be the God, and cannot be worshipped in those cases in which the substitution of a new image is necessary."[5]

Non-existing idol.

A gift to a trustee either by an instrument *inter vivos* or by will for the purpose of establishing and dedicating a non-existing idol is valid.[6]

Trustee or Manager.

Trustees, etc.

Although the appointment of a trustee may not be in law necessary for the valid creation of an endowment,[7] it follows from the nature of the things that there must be a trustee, manager, or other person charged with its administration.[8]

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claim the idol also); *Jagadindra Nath Roy Bahadur (Maharajah)* v. *Hemanta Kumari Debi (Rani)* (1904), 31 I. A. 203, at pp. 209, 210; 32 Calc. 129, at pp. 140, 141; 8 C. W. N. 809, at p. 820; 6 Bom. L. R. 765; *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112, at p. 127; *Bali Panda* v. *Jadumoney Santra* (1910), 38 Calc. 284; 15 C. W. N. 36.

[1] *Jodhi Rai* v. *Basdeo Prasad* (1911), 33 All. 735, overruling *Raghunathji Maharaj (Thakur)* v. *Shah Lal Chand* (1897), 19 All. 330.

[2] *Post*, p. 563.

[3] The destruction or mutilation of the image does not affect the endowment; *Bijoy Chand Mahatab* v. *Kali Pada Chatterjee* (1913), 41 Calc. 57; 17 C. W. N. 1013.

[4] Evil spirit.

[5] G. C. Sarkar's "Hindu Law," 3rd ed., p. 441, and texts there cited. See *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (1880), 7 C. L. R. 278, at p. 281.

[6] *Bhupati Nath Smrititirtha* v. *Ram Lal Moitra* (1909), 37 Calc. 128; 14 C. W. N. 18, overruling *Upendra Lal Boral* v. *Hem Chundra Boral* (1897), 25 Calc. 405; 1 C. W. N. 295; *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (1901), 29 Calc. 260; 6 C. W. N. 269, and *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (1902), 30 Calc. 521; 7 C. W. N. 121; *Mohar Singh* v. *Het Singh* (1910), 32 All. 337; *Chatarbhuj* v. *Chatarjit* (1911), 33 All. 253. As to a gift to an unnamed idol, see *ante*, p. 539, note 3.

[7] See *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112; *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 12 Bom. 247, at p. 263.

[8] See *Koonla Kant Ghosal* v. *Ram Huree Nund Gramee* (1827), 4 Ben. Sel. R. 196, at p. 200 (new edition 247, at p. 252).

A woman could not, as such, be excluded from the management of endowed property, but she is incompetent to discharge spiritual duties.[1] Females.

There is nothing to prevent the person who creates the endowment constituting himself a trustee. Endower may be trustee.

It does not follow that where an endowment is created without a trustee the person creating the endowment is liable as trustee.[2]

When no endowment or trust has been created, there is no obligation to provide for the expenses of a family idol.[3] No obligation where no endowment.

A trust is not necessary in law for the purpose of effecting a dedication to an idol;[4] but as it is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must in the nature of things be entrusted to some person as trustee or manager.[5] Trust.

The person to whom the management and superintendence of an endowed temple or idol and of the worship are entrusted is called the *Shebait*.[6] *Shebait.*

The *shebait* has not the legal property, but only the title of manager, of a religious endowment.[7] The property is vested in the deity.[8] His successor is not entitled to letters of administration of the property.[9]

The *shebait* is entitled to the custody of the idol and its property. As to the limitation in a suit by him for such custody, see *Bali Panda* v. *Jadumani Santra*, [1910] 15 C. W. N. 36. Custody of idol.

The right of a *shebait* or of a priest to offerings made to the idol would Right to offerings.

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[1] See *Janoki Debi* (*Srimati*) v. *Gopal Acharjia* (*Sri*) (1882), 10 I. A. 32; 9 Calc 766; 13 C. L. R. 30; *Joy Deb Surmah* v *Huroputty Surmah* (1871), 16 W. R. C. R. 282; *Surendra Keshav Roy* v. *Doorgasundari Dassee* (1892), 19 I. A. 108, at p. 128; 19 Calc. 513, at pp. 531, 532; *Keshavbhat* v. *Bhagirathibai* (1866), 3 Bom. H. C. A. C. 75; *Sundarambal Ammal* v. *Yogavanagurukkal* (1914), 38 Mad. 850; *Rajeswari Ammal* (*Raja*) v. *Subramania Archakar* (1915), 40 Mad. 105.

[2] *Raghubar Dial* v. *Kesho Ramanuj Das* (1888), 11 All. 18; *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (1872), 18 W. R. C. R. 399.

[3] *Sham Lal Set* v. *Huro Soonduree Goopta* (1866), 5 W. R. C. R. 29.

[4] *Manohar Ganesh Tambekar* v. *Lakmiram Govindram* (1887), 12 Bom. 247, at p. 265; S. C. on appeal *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N. 23; 2 Bom. L. R. 516; *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (1897), 25 Calc. 112.

[5] *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145, at p. 152; 14 B. L. R. 450, at p. 459; 23 W. R. C. R. 253, at pp. 255, 256; *ante*, p. 556.

[6] See Wilson's "Glossary," p. 476.

[7] *Shibessouree Debia* (*Maharanee*) v. *Mothooranath Acharjo* (1869), 13 M. I. A. 270, at p. 273; 13 W. R. P. C. 18, at p. 19; *Babajirao* v. *Luxmandas* (1903), 5 Bom. L. R. 932; *Ratnendra Lal Mitter* v. *Corporation of Calcutta* (1913), 41 Calc. 104.

[8] *Ante*, p. 555.

[9] Cf. *Jib Lal Gir* (*Mohunt*) v. *Jaga Mohan Gir* (*Mohunt*) (1898), 16 C. W. N. 798.

depend upon the nature of such offerings. Where they are of a perishable nature, such as articles of food, they would be appropriated by the priest or by the nearest Brahmin available; but where the idol is an ancient one permanently established for public worship, and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the owner to the contrary, they are taken to be intended to contribute to the maintenance of the shrine with all its rites, ceremonies, and charities, and not become the personal property of the priest.[1]

Right to possession and management.

The possession and management of the dedicated property and the office are vested in the *shebait*[2] or other manager.

The Court can in a proceeding under s. 145 of the Criminal Procedure Code (V. of 1898) declare the possession of a temple, but not of the offerings[3] or of the right to act as priest.[4]

Although he is only a manager, all transactions including litigation are carried on by him in his own name.[5]

As to suits brought by him, see *post*, p. 563.

He is not only empowered but is bound to do whatever is necessary for the benefit or preservation of the properties of the idol[6] or of the endowment.

As to his power to alienate the property, see *post*, p. 564.

Reimbursement.

A manager, or trustee,[7] or his executor after his death, is entitled to be reimbursed from the trust estate all sums properly expended by him as manager, including moneys properly expended by him in defending his position as *shebait* against an unsuccessful claimant to the office.[8]

In the case of a suit by the executor of the manager, the period of limitation is six years.[9]

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[1] *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (1896), 23 Calc. 645, at p. 655. As to an account of the offerings, see *post*, p. 560. As to the right of Agradani Brahmins to things given away at a *sradh*, see *Hari Churn Agradani* v. *Sasti Churn Agradani* (1910), 14 C. W. N. 1005.

[2] *Jagadindra Nath Roy Bahadur* (*Maharaja*) v. *Hemanta Kumara Debi* (*Rani*) (1904), 31 I. A. 203; 32 Calc. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; *Kunjamani Dossi* v. *Nikunja Bihari Das* (1915), 20 C. W. N. 314.

[3] *Ram Saran Pathak* v. *Raghu Nandan Gir* (1910), 38 Calc. 387. Cf. *Kader Batcha* v. *Kader Batcha Rowthan* (1905), 29 Mad. 237.

[4] *Guiram Ghosal* v. *Lal Behari Das* (1910), 37 Calc. 578.

[5] *Juggodumba Dossee* v. *Puddomoney Dossee* (1875), 15 B. L. R. 318, at p. 330; *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435, at p. 442; *Babajirao* v. *Luxmandas* (1903), 5 Bom. L. R. 932.

[6] *Pramada Nath Roy* v. *Poorna Chandra Roy* (1908), 35 Calc. 691, at p. 698; 12 C. W. N. 550, at p. 557.

[7] *Narayanan* v. *Lakshmanan* (1915), 39 Mad. 456.

[8] *Peary Mohan Mukerji* v. *Norendra Nath Mukerji* (1909), 37 I. A. 27; 37 Calc. 229; 14 C. W. N. 261.

[9] *Ibid.* Act XV. of 1877 (Limitation Act), Sch. II., Art. 120; Act IX. of 1908, Sch. I., Art. 120.

"As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time has become vested by descent in more than one person."[1]

Position of manager.

A trustee or manager has power to dismiss servants of the temple for misconduct.[2]

"It is the duty of the trustee or manager to maintain the customary usages of the institution, and if he fails to do so he is . . . guilty of a breach of trust, and, still more so, if he deliberately attempts to effect a vital change of usage and make it binding on the worshippers by obtaining a decree of the Court to establish it."[3]

To follow customary usage.

He may be restrained by injunction from making any unjustifiable changes which would affect the character of the temple as a religious institution.[4]

In the absence of an express injunction by the founder, a Court, where it is necessary, may permit a *shebait* to remove the idol to his house to remain there during his turn of worship.[5]

Where any details of the management are regulated by custom, such custom should, if reasonable, be followed, as, for instance, a custom as to the fund from which repairs are to be provided.[6]

Where there are joint managers they must execute the duties of their office jointly.[7]

Joint managers.

A decision of the majority of the trustees of a public trust, arrived at in the fair exercise of their powers, and after fair consideration by all of them,[8] binds the minority in matters connected with the management of the trust property, yet it does not bind them in matters which are *ultra vires* and beyond the proper sphere of the trust.[9]

Decision of majority of trustees.

The manager must apply the income to the purposes of the endowment.

Application of income.

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[1] *Ramanathan Chetti* v. *Murugapa Chetti* (1906), 33 I. A. 139, at p. 144; 29 Mad. 283, at p. 289; 10 C. W. N. 824, at p. 829; 8 Bom. L. R. 598.

[2] *Seshadri Aiyangar* v. *Ranga Bhattar* (1911), 35 Mad. 631. As to the position of a superintendent, see *Ram Charan Bajpai* v. *Rakhal Das Mookerjee* (1913), 41 Calc. 19; 17 C. W. N. 1045.

[3] Judgment of the Madras High Court in *Sankaralinga Nadan* v. *Rajeswara Dorai* (1908), 35 I. A. 176, at p. 180; 12 C. W. N. 940, at p. 951. See *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435, at pp. 454, 455.

[4] *Krishnasami Ayyangar* v. *Samaram Singrachariar* (1906), 30 Mad. 158.

[5] *Ram Soonder Thakoor* v. *Taruck Chunder Turkoruthun* (1872), 19 W. R. C. R. 28.

[6] *Vythilinga Pandara Sannadhi* v *Soonasundara Mudaliar* (1893), 17 Mad. 199.

[7] See *Abdul Gofur Mandal* v. *Umakanta Pandit* (1914), 19 C. W. N. 260

[8] *Charavur Teramath* v. *Urath Lakshmi* (1883), 6 Mad. 270; *Kunhan* v. *Moorthi* (1910), 34 Mad. 406.

[9] *Samaram Singaracharia*r v. *Krishnaswami Ayyangar* (1902), referred to at 30 Mad. 103.

As to the powers of the heads of *mutts*, see *post*, pp. 561, 562.

Where there was a *bonâ fide* dispute as to the succession to the office of *ojha* or high priest of a temple, the Court upheld an arrangement by which a sum of money was to be paid out of the offerings to one of the claimants.[1]

Account.

A *shebait* or other manager or trustee is liable to account in respect of his management of, or dealing with, the property,[2] including offerings received on account of an idol, or gifts made to the institution.[3]

The votary "must needs be and is concerned in the maintenance of a decent and orderly worship. He is interested, too, in the honour and respect of the deity he reveres. . . . He desires a regular and continuous or at least a periodical round of sacred ceremonies, which might fail if the offerings of past years were all squandered, while those of any given year fell short." [4]

Brotherhoods attached to temples.

The constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them." [5]

"Mutt."

A *mutt or muttam* (a monastic religious institution devoted to the teaching of the different systems of Hindu religious philosophy) is presided over by a head who is variously called a *mohunt*, a *swami*, a *gosavi*, a *sannyasi* (if a Brahmin), a *paradasi* (if a Sudra), or a *jeer*.

Their origin.

"The origin of *muttams* is ordinarily as follows: A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order, and instructs in his religious tenets. Such of these disciples as intend to become religious teachers,

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1 *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (1896), 23 Calc. 645.

2 Even if he is himself the founder of the endowment, *Thackersey Dewraj* v. *Hurbhum Nursey* (1883), 8 Bom. 432.

3 *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 21 Bom. 247, at pp. 261, 262; S. C. on appeal *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N. 23; 2 Bom. L. R. 516; *ante*, pp. 557, 558; *Jugal Kishore* v. *Lakshmandas* (1899), 23 Bom. 659. See *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 35 Calc. 226; 12 C. W. N. 323.

4 *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 12 Bom. 247, at pp. 261, 262; S. C. upheld on appeal *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N 23; 2 Bom. L. R. 516.

5 *Muttu Ramalinga Setupati (Rajha)* v. *Perianayagum Pillai* (1874), 1 I. A. 209, at p. 228.

renounce their connection with their family, and all claims to the family wealth, and, as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being, and a house for the school is erected, and a *mattam* constituted. The property of the *mattam* does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent and in his own lifetime installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the *gaddi*, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office." [1]

As to the origin of *mutts*, see *Kailasam Pillai* v. *Natarajah Tambiran* (1909), 33 Mad. 265; *Sammantha Pandara* v. *Sellappa Chetti* (1879), 2 Mad. 175; *Giyana Sambanda Pandara Sannadhi* v. *Kandasami Tambiran* (1887), 10 Mad. 375; *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435; Ghose's "Hindu Law," Chap. VIII.

" In the case of *mutts* . . . though there are idols connected therewith, the worship of such is quite a secondary matter, the principal purpose of such an institution being the maintenance, in circumstances likely to command the respect and estimation, of a line of competent religious teachers who . . . are given for the welfare of the foundation itself, a real and, so to speak, beneficial interest in the usufruct, the restrictions governing the disposition thereof being of the nature of a mere moral obligation. Having regard to these facts, it is obvious that the correct view to be taken is that in the case of *mutts* the ideal person is the office of the spiritual teacher *Acharya*, which, as it were, is incarnate in the person of each successive *swami* who for the time is a real owner, and not a mere trustee." [2]

Object of Mutt.

The law as to *mohunts* and their offices, functions and duties is to be found in custom and practice which in each case has to be proved by evidence.[3]

The position and powers of the *mohunt*, *swami*, or *gosavi* or other head of a *mutt* are different from those of the *shebait* or other manager of a temple or endowment for an idol.

Mohunt.

In the absence of a grant or usage enforcing a specific trust a *mohunt* is not accountable for his expenditure of the income

Powers over income.

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[1] *Sammantha Pandara* v. *Sellappa Chetti* (1879), 2 Mad. 175, at p. 179.

[2] *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435, at pp. 442, 454, 455.

[3] *Greedharee Doss* v. *Nundokishore Doss* (1867), 11 M. I. A. 405, at p. 428; 8 W. R. P. C. 25, at p. 26.

of the endowment. He is, however, required therewith to maintain the purposes of the *mutt*, the surplus, if any, being at his unfettered disposal. The property of the endowment is, in a certain sense, trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution.[1]

Powers over corpus.

His powers over the corpus are no greater than those of other managers. He is not the owner of the *mutt* property, and on his death his successor is not entitled to letters of administration in respect of that property.[2]

Lunacy.

In the absence of custom lunacy does not devest the rights of the head of a *mutt*.[3]

Manager need not be an ascetic.

The manager of a *mutt* need not necessarily be an ascetic. Whether he must be so or not depends upon the usage of the institution.[4]

In some cases the head of a *mutt* may be a married man.[5] Among the Gosains of the Deccan and certain other places marriage does not work a forfeiture of the office of *mohunt* and the rights and properties appendant to it.[6]

May own property.

There is nothing to prevent a *mohunt* possessing private property, nor is there any presumption that property held by him belongs to the *mutt*;[7] but it has been held in Bombay[8] that the *swami* of a *mutt* presumably has no private property, and must be assumed to be pledging the credit of the *mutt* when he borrows money for the purposes of the *mutt*.

As to the inheritance to a *mohunt*, see *ante*, pp. 415, 416.

Powers of manager.

"A *shebait*, *mohunt*, or other manager of an endowment may deal with the endowed property for its benefit and preservation, and especially for the purpose of defending it from hostile litigious attack."[9]

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1 See *Ram Prakash Das (Mahant)* v. *Anand Das (Mahant)* (1916), 43 I. A. 73; 43 Calc. 707; 20 C. W. N. 802; 18 Bom. L. R. 490; *Kailasam Pillai* v. *Nataraja Thambiran* (1909), 33 Mad. 265, referring to *Giyana Sambandha Pandara Sannadhi* v. *Kanda Sami Tambiran* (1887), 10 Mad. 375, and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435; *Muthusamier* v. *Sreemethanithi Swamiyar* (1913), 38 Mad. 356; *Burm Suroop Doss (Mohunt)* v. *Khashee Jha* (1873), 20 W. R. C. R. 471; *Khusalchund* v. *Mahadevgiri* (1875), 12 Bom. H. C. 214.

2 *Jib Lal Gir (Mohunt)* v. *Jaga Mohan Gir (Mohunt)* (1898), 16 C. W. N. 798.

3 *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435.

4 *Sathappayyar* v. *Periasami* (1890), 14 Mad. 1, at pp. 9, 10.

5 See *Sathapayyar* v. *Periasami* (1890), 14 Mad. 1.

6 *Rambharti Jagrupbharti (Gosain)* v. *Surajbharti Haribharti (Mohant)* (1880), 5 Bom. 683.

7 *Kishora Dossjee (Sree Mohant)* v. *Coimbatore Spinning and Weaving Company* (1902), 26 Mad. 79.

8 *Shankar Bharati Svami* v. *Venkapa Naik* (1885), 9 Bom. 422.

9 *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145, at p.

He is "empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir." [1]

The manager of an endowment has all the ordinary powers of a manager.

He can create derivative tenures and estates conformable to usage; and leases for a reasonable term. [2] Leases.

As to permanent leases, see *post*, pp. 565, 566.

If the manager grant a lease for an unreasonable term, it would apparently enure so long as he continues to be manager. [3]

A person who has no independent rights, but is a mere nominee of the person to whom the endowment was granted, has no authority to grant leases. [4]

As to the power of a mohunt to dismiss a subordinate, see *Tiruvambal Desikar* v. *Manikkavachaka Desikar* (1915), 40 Mad. 177.

The deposition of the manager of an endowment by the act of a foreign state does not affect his rights in respect of property in British India. [5]

A *mohunt*, *shebait*, or other manager of an endowment is entitled to sue where it be necessary on behalf of the endowment for the protection or realization of the property of the endowment, or otherwise for its benefit. [6] Person to sue.

He is not entitled to sue for a mere declaration when he is entitled to substantive relief. [7]

For an instance of a suit to exclude certain persons from worshipping in a temple, see *Sankaralinga Nadan* v. *Rajeswara Dorai (Raja)* (1908), 35 I. A. 176; 31 Mad. 236; 12 C. W. N. 546.

Persons interested as worshippers in a public religious endowment may be added as parties to a suit instituted by a trustee on behalf of the Parties to suit.

151; 14 B. L. R. 450, at p. 458; 23 W. R. C. R. 253, at p. 255; *Hossein Ali Khan* v. *Bhagaban Das (Mahanta)* (1906), 34 Calc. 249, at p. 255; 11 C. W. N. 261, at p. 265; *Pramada Nath Roy* v. *Poorna Chandra Roy* (1908), 35 Calc. 691, at p. 698; 12 C. W. N. 559, at p. 557.

[1] *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145, at p. 152; 14 B. L. R. 450, at p. 459; 23 W. R. C. R. 253, at pp. 255, 256.

[2] *Shibessuree Debia (Maharanee)* v. *Mothooranath Acharjo* (1869), 13 M. I. A. 270; 13 W. R. P. C. 18; *Nallayappa Pillian* v. *Ambalavahana Pandara Sannadhi* (1903), 2 Mad. 465.

[3] *Arruth Misser* v. *Juggurnath Indraswamee* (1872), 18 W. R. C. R. 439; *Burm Suroop Doss (Mohunt)* v. *Khashee Jha* (1873), 20 W. R. C. R. 471; *Ramchandra Shankarbava Dravid* v. *Kashinath Narayan Dravid* (1894), 19 Bom. 271, see *post*, p. 556.

[4] *Ram Doss* v. *Mohesur Deb Missree* (1867), 7 W. R. C. R. 446.

[5] *Goswami Shri Girdharji* v. *Madhowdas Premji* (1893), 17 Bom. 601; *Goswami (Shriman)* v. *Goswami Shri Girdharlalji* (1878), 17 Bom. 620.

[6] See *Sankamurti Mudaliar* v. *Chidambara Nadan* (1893), 17 Mad. 143; *Jagadindra Nath Roy Bahadur (Maharaja)* v. *Hemanta Kumari Debi (Rani)* (1904), 31 I. A. 203; 32 Calc. 129; 8 C. W. N. 809; 6 Bom. L. R. 765. Where the manager is a minor he obtains the benefit of s. 6 of the Limitation Act (IX. of 1908), *ibid.* See also Act XV. of 1877, s. 7.

[7] *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (1910), 33 Mad. 452. Specific Relief Act (I. of 1877), s. 42.

endowment against third parties, if such joinder is considered by the Court as desirable in the interests of the trust,[1] as where the trustee after a decree by the first Court had relinquished his rights.[2]

Debts and alienation.

The manager of an endowment may incur debts and borrow money for the proper expenses of the endowment such as keeping up the religious worship, repairing the temples,[3] or other possessions of the idol, defending hostile litigious attacks, and other like objects. He may alienate or encumber the property to the extent to which there is an existing necessity for so doing, his power in that respect being analogous to that possessed by the manager for an infant heir,[4] or a female with a restricted estate.[5]

The advisability of filling up a tank is not a sufficient necessity.[6]

The making of a tank may amount to a necessity.[7]

De facto manager.

Debts incurred by a *de facto* manager of an endowment (other than a mere trespasser)[8] *bonâ fide* in the interests of the endowment would apparently be on the same footing as that incurred by a *de jure* manager.[9] A mortgage by a mere claimant to the membership is not sustainable.[10]

Personal liability.

Except where he has pledged his personal credit the manager is not personally liable for the debts of the endowment.[11]

As to the alienation of rights of worship, see *post*, pp. 573, 574.

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[1] *Chidambaram Chettiar* v. *Rungachariar* (*Sri*) (1905), 29 Mad. 106.

[2] *Sankaralinga Nadan* v. *Rajeswara Dorai* (*Raja*) (1908), 35 I. A. 176; 31 Mad. 236; 12 C. W. N. 546.

[3] *Doorganath Roy* (*Konwur*) v. *Ramchunder Sen* (1876), 4 I. A. 52, at pp. 62, 63; 2 Calc. 341, at pp. 350, 351.

[4] *Abhiram Goswami* v. *Shyama Charan Nandi* (1909), 36 I. A. 148; 36 Calc. 1003; 14 C. W. N. 1; 11 Bom. L. R. 1234; *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145; 14 B. L. R. 450; 23 W. R. C. R. 253; *Hossein Ali Khan* v. *Bhagaban Das* (*Mahanta*) (1906), 34 Calc. 249; 11 C. W. N. 261; *Doorganath Roy* (*Konwur*) v. *Ramchunder Sen* (1876), 4 I. A. 52, at p. 63; 2 Calc. 341, at p. 351; *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (1896), 24 Calc. 77, at p. 82; *Ramprasanna Nandi Chowdhuri* v. *Secretary of State* (1913), 40 Calc. 895; *Collector of Thana* v. *Hari Sitaram* (1882), 6 Bom. 546; *Parsotam Gir* v. *Dat Gir* (1903), 25 All. 296, at pp. 304, 311; *Daivasikamani Pandarasannidhi* (*Srimath*) v. *Noor Mahomed Routhan* (1907), 31 Mad. 47; *Palaniappa Chetty* v. *Deivasikamony Pandara* (1917), 44 I. A. 147; 21 C. W. N 729; 19 Bom. L. R 587; *Khusalchand* v. *Mahadevgiri* (1875), 12 Bom. H. C. 214. In *Narayan* v. *Chintaman* (1881), 5 Bom. 393, the Court limited the power to the pledging of the income. As to the powers of a manager for an infant heir, see *ante*, pp. 285–290.

[5] *Jugessur Buttobyal* v. *Roodro Narain Roy* (*Rajah*) (1869), 12 W. R. C. R. 293; *Kunjamani Dassi* v. *Nikunja Bihari Das* (1915), 20 C. W. N. 314.

[6] *Jnananjan Banerjee* v. *Adoremoney Dassee* (1909), 13 C. W. N. 805.

[7] Cf. *Khub Lal Singh* v. *Ajodhya Misser* (1915), 43 Calc. 574.

[8] *Ram Churn Pooree* v. *Nunhoo Mundul* (1870), 14 W. R. C. R. 147.

[9] See *Saminatha* v. *Purushottama* (1892), 16 Mad. 67; *Kasim Saiba* v. *Sudhindra Thirtha Swami* (1895), 18 Mad. 359.

[10] See *Madho Prasad* v. *Ramrattan Gir* (1911), 15 C. W. N. 838.

[11] See *Peary Mohun Mookerjee* (*Rajah*) v. *Narendra Krishna Mukerjee* (1900), 5 C. W. N. 273.

The annual revenues of endowments, as distinguished from the *corpus*, may occasionally, when it is necessary to do so in order to raise money for purposes essential to the temple or other institution, but not further or otherwise, be pledged.[1] Pledges of revenue.

As to the proceeds of land acquired for public purposes, see *Kamini Debi* v. *Pramatha Nath Mookerjee* (1911), 39 Calc. 33; *Ramprasanna Nandi Chowdhuri* v. *Secretary of State* (1913), 40 Calc. 895; 19 C. W. N. 652.

A *mohunt*, manager, or other trustee of an endowment cannot, except for such necessary purposes as above mentioned, alienate or encumber the endowed property.[2]

Bombay Act II. of 1863, s. 8, cl. 8, provides:—

"It is, however, hereby declared that lands held on behalf of religious or charitable institutions wholly or partially exempt from the payment of land revenue shall not be transferable from such institutions either by assignment, sale (whether such sale be judicial, public, or private), gift, devise, or otherwise howsoever, and no *Nazrana* shall be liable on account of such lands."[3] Lands exempt from land revenue.

As to the exemption of religious and charitable institutions from land revenue in territories subject to Act XI. of 1852, *i.e.* in the territories of the Dekkan, Khandesh, and Southern Maratha country, and in other districts more recently annexed to the Bombay Presidency, see the above section.

A permanent lease cannot be given by a *mohunt*, *shebait*, or Permanent lease.

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1 *Narayan* v. *Chintaman* (1881), 5 Bom. 393.

2 *Murugesam Pillai* v. *Manickavasaka Pandara* (1917), 44 I. A. 98; 40 Mad. 402; 21 C. W. N. 761; 19 Bom. L. R. 456; *Abhiram Goswami* v. *Shyama Charan Nandi* (1909), 36 I. A. 148, at p. 164; 36 Calc. 1003, at p. 1013; 14 C. W. N. 1, at p. 10; 11 Bom. L. R. 1234, at p. 1247; *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145; 14 B. L. R. 450; 23 W. R. C. R. 253; *Gnasambanda Pandara Sannadhi* v. *Velu Pandaram* (1899), 27 I. A. 69; 22 Mad. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; *Gopal Dass* (*Mohunt*) v. *Kerparam Dass* (*Mohunt*), Ben. S. D. A. 1850, p. 250; *Jnananjan Banerjee* v. *Adoremoney Dassee* (1909), 13 C. W. N. 805; *Ganesh Dharnidhar Maharajdev* (*Shri*) v. *Keshavrav Gobind Kulgavkar* (1890), 15 Bom. 625; *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1904), 27 Mad. 435, at pp. 439, 456; *Shibessuree Debia* (*Maharanee*) v. *Mothooranath Acharjo* (1869), 13 M. I. A. 270; 13 W. R. P. C. 18; *Narayan* v. *Chintaman* (1881), 5 Bom. 393; *Collector of Thana* v. *Hari Sitaram* (1882), 6 Bom. 546; *Nallayappa Pillian* v. *Ambalavahana Pandara Sannadhi* (1903), 27 Mad. 465; *Sambanda Mudaliyar* v. *Nanasambandapandara* (1863), 1 Mad. H. C. 298. When the property has been acquired by Government under the Land Acquisition Act (I. of 1894, s. 31 (2)), the award may direct investment of the compensation money in Government securities, *Shiva Rao* v. *Nagappa* (1905), 29 Mad. 117; *Kamini Debi* v. *Pramatha Nath Mookerjee* (1911), 39 Calc. 33; *Ramprasanna Nandi Chowdhuri* v. *Secretary of State* (1913), 40 Calc. 895.

3 See *Narayan* v. *Chintaman* (1881), 5 Bom. 393.

other manager except under circumstances which justify an alienation.[1]

Limitation.

As to the limitation for a suit to set aside such lease, see Act IX. of 1908, Sched. 1, Art. 134; and as to the law under the Limitation Act of 1877, *Abhiram Goswami* v. *Shyama Charan Nandi* (1909), 36 I. A. 148; 36 Calc. 1003; 14 C. W. N. 1; 11 Bom. L. R. 1234; followed in *Shyam Chand Jiu* (*Sri Sri Ishwar*) v. *Ram Kanai Ghose* (1911), 38 I. A. 76; 38 Calc. 526; 15 C. W. N. 417; 13 Bom. L. R. 421.

As to the alienation of the interest of the grantor in property upon which endowments have been charged, see *ante*, p. 549.

Repudiation.

An act in excess of his powers by a manager or other trustee is voidable, and subject to the law of limitation can be repudiated by a subsequent holder of the office,[2] or by any other person interested in the trust.

In the case of a *mutt* an unauthorized alienation by the head would apparently enure for the life of the grantor,[3] or at any rate during his tenure of office, provided, at any rate, that the service of the *mutt* be not prejudiced thereby.

The successor bound by acts.

The *shebait* or other manager of an endowment is bound by the lawful acts of the previous incumbent, but not by acts done in fraud of the trust.[4]

Limitation.

The right of a manager to sue to recover property of the endowment unlawfully alienated by his predecessor commences at the date of his accession to office.[5]

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[1] *Abhiram Goswami* v. *Shama Charan Nandi* (1909), 36 I. A. 148; 36 Calc. 1003; 14 C. W. N. 1; 11 Bom. L. R. 1234; *Muthusamier* v. *Sreemethamithi Swamiyar* (*Sree*) (1913), 38 Mad. 356; *Jnananjan Banerjee* v. *Adoremoney Dassee* (1909), 13 C. W. N. 805; *Radha Bullubh Chund* v. *Juggut Chunder Chowdree* (1826), 4 Ben. Sel. R. 151 (new edition, 192); *Prosunno Moyee Dossee* v. *Koonjo Beharee Chowdhree*, W. R. 1864, C. R. 157; *Juggessur Buttobyal* v. *Roodroo Narain Roy* (1869), 12 W. R. C. R. 299; *Tayubunnessa Bibee* v. *Sham Kishore Roy* (*Kuwar*) (1871), 7 B. L. R. 621; 15 W. R. C. R. 228; *Prosunno Kumar Adhikari* v. *Saroda Prosunno Adhikari* (1895), 22 Calc. 989; *Narasimha Chari* v. *Gopala Ayyangar* (1905), 28 Mad. 391; *Palaniappa Chetty* v. *Deivasikamony Pandara* (1917), 44 I. A. 147; 21 C. W. N. 729; 19 Bom. L. R. 587. Necessity was presumed where the land had been held over sixty years under a lease, *Chakalingam Pillai* v. *Mayandi Chettiar* (1896), 19 Mad. 485.

[2] See *Mahomed* v. *Ganapati* (1889), 13 Mad. 277; *Jamal Saheb* v. *Murgaya Swami* (1885), 10 Bom. 34.

[3] See *Abhiram Goswami* v. *Shyama Charan Nandi* (1909), 36 I. A. 148; 36 Calc. 1003; 14 C. W. N. 1; 11 Bom. L. R. 1234; *Jamal Saheb* v. *Murgaya Swami* (1885), 10 Bom. 34; *Muthusamier* v. *Sreemethamithi Swamiyar* (1913), 38 Mad. 356.

[4] *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy* (1872), 1 B. L. R. 337, note; 17 W. R. C. R. 44.

[5] *Mahomed* v. *Ganapati* (1889), 13 Mad. 277; *Vedapuratti* v. *Vallabha* (1890), *ibid.* 402; *Sathianama Bharati* v. *Saravanabagi Ammal* (1894), 18 Mad. 266. See *Nilmony Singh* v. *Jagabandha Roy* (1896), 23 Calc. 536; *Gnasambanda Pandara Sannadhi* v. *Velu Pandaram* (1899), 27 I. A. 69;

A right of adverse possession may be acquired against an idol or his *shebait* [1] or against any endowment. **Adverse possession.**

Possession of *debutter* property which is adverse against some of the *shebaits* is necessarily adverse against all of them.[2]

Adverse possession during a previous office holder's time bars his successor.[3]

As to a suit for a declaration of right to the offerings to the idol, see *Jalandhar Thakur* v. *Jharula Das* (1914), 41 I. A. 267; 42 Calc. 244; 18 C. W. N. 1029; 16 Bom. L. R. 845.

The manager may be sued as manager for debts lawfully contracted by his predecessor, although they were not expressly charged upon the endowed property.[4] **Debts of previous manager.**

A decree untainted by fraud or collusion which is made in a suit by or against a *shebait* as representing the idol or against the head of a *mutt* as representing the *mutt* is binding on succeeding *shebaits* [5] or heads of the *mutt*, as the case may be.[6] **Decree binds successor.**

Property belonging to an endowment may be attached or sold under a decree properly made against the trustee or manager as such,[7] but it cannot be attached or sold in pursuance of a decree passed against the trustee or manager personally.[8] **Attachment of property.**

Where it is so attached [9] or sold [10] the manager may assert the rights of the endowment by a claim or suit, as the case may be.

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23 Mad. 271; 4 C. W. N. 329; 2 Bom. L. R. 597 (hereditary office).

[1] See *Damodar Das* v. *Lakhan Das (Adhikari)* (1910), 37 I. A. 147; 37 Calc. 885; 14 C. W. N. 889; 12 Bom. L. R. 632; *Pandurang Balaji* v. *Dnyanu* (1911), 36 Bom. 135; 13 Bom. L. R. 1169.

[2] *Jnananjan Banerjee* v. *Adoremoney Dassee* (1909), 13 C. W. N. 805.

[3] *Chidambaran Chetti* v. *Minammal* (1898), 23 Mad. 439.

[4] *Daivasikamani Pandara Sannidhi (Srimath)* v. *Noor Mahomed Routhan* (1907), 31 Mad. 47.

[5] *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1875), 2 I. A. 145; 14 B. L. R. 450; 23 W. R. C. R. 253; S. C. in Court below (1873), 11 B. L. R. 332; *Ranjit Sinha Bahadur (Raja)* v. *Basunta Kumar Ghose* (1908), 12 C. W. N. 739; *Gora Chand Lurki* v. *Makhan Lal Chakravarty* (1907), 11 C. W. N. 489; *Krishna Kissore Chakravarti* v. *Sukha Sindhu Sanyal* (1906), 10 C. W. N. 1000; *Tulsidas Mahanta* v. *Bejoy Kishore Shome* (1901), 6 C. W. N. 178; *Jharula Das* v. *Jalandhar Thakur* (1912), 39 Calc. 887; S. C. on appeal, *Jalandhar Thakur* v. *Jharula Das* (1914), 41 I. A. 267; 42 Calc. 244; 18 C. W. N. 1029; 16 Bom. L. R. 845; *Nagendra Nath Mukerjee* v. *Probal Chandra Mukerjee* (1912), 17 C. W. N. 964.

[6] *Manikka Vasaka Desikar* v. *Balagopala Krishna Chetty* (1906), 29 Mad. 553; *Subindra* v. *Budan* (1885), 9 Mad. 80.

[7] *Pramada Nath Roy* v. *Poorna Chandra Roy* (1908), 35 Calc. 691; 12 C. W. N. 550.

[8] *Bishen Chand Basawut* v. *Nadir Hossein (Syed)* (1887), 15 I. A. 1; 15 Calc. 329; *Ram Krishna Mahapatra* v. *Padma Charan Deb Goswami (Mohunt)* (1902), 6 C. W. N. 663.

[9] *Jogendra Nath Sarkar* v. *Gobinda Chandra Dutt* (1908), 35 Calc. 364; 12 C. W. N. 310; *Bhojahari Pal* v. *Ram Lal Das* (1901), 6 C. W. N. 63.

[10] *Amar Chand Kundu* v. *Nani*

The sale does not give the purchaser any right as *shebait*.[1]

Devolution of Trust or Management.

Terms of endowment.

Where the terms of the grant creating the endowment provide for the devolution of the trusteeship or managership they should be followed.[2]

For instance, a grant to a *gosavi* and his disciples in perpetual succession.[3]

Where it was provided that the succession should be "*shishya shishyanukrame*" (disciple following disciple), it was held that a disciple could succeed a co-disciple.[4]

Usage.

In the absence of evidence of the endower having laid down a rule of succession, the usage which has been observed in the selection of a successor in the particular institution should be followed.[5]

"In determining who is to be entitled to succeed as *mohunt* in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it. This has been laid down by the Committee in several cases." [6]

Gopal Mukerjee (1907), 12 C. W. N. 308; *Ram Krishna Mahapatra* v. *Padma Charan Deb Goswami* (*Mohunt*) (1902), 6 C. W. N. 663.

[1] *Jalandhar Thakur* v. *Jharula Das* (1914), 41 I. A. 267; 42 Calc. 244; 18 C. W. N. 1029; 16 Bom. L. R. 845; post, p. 573.

[2] See *Sitapershad* v. *Thakur Dass* (1879), 5 C. L. R. 73; *Bishambhar Das* v. *Drigbijai Singh* (1905), 27 All. 581; 9 C. W. N. 914; *Ram Chunder Adhikaree* v. *Ram Jeebun Adhikaree* (1869), 12 W. R. C. R. 427; *Raj Krishna Dey* v. *Bipin Behary Dey* (1912), 40 Calc. 245; 17 C. W. N. 591.

[3] *Khusalchand* v. *Mahadevgiri* (1875), 12 Bom. H. C. 214.

[4] *Gopal Chandra Chakrabarty* v. *Radharaman Das Babaji* (1911), 16 C. W. N. 108.

[5] *Janoki Debi* (*Srimati*) v. *Sri Gopal Acharjia* (1882), 10 I. A. 32; 9 Calc. 766; 13 C. L. R. 30; *Greedharee Doss* v. *Nundo Kishore Doss Mohunt* (1867), 11 M. I. A. 405, at p. 428 (see p. 421); 8 W. R. P. C. 25; *Muttu Ramalinga Setupati* (*Rajah*) v. *Perianayagum Pillai* (1874), 1 I. A. 209; *Vurmah Valia* (*Rajah*) v. *Vurmah Mutha* (*Ravi*) (1876), 4 I. A. 76; 1 Mad. 235, at p. 250; *Lahar Puri* (*Mohunt*) v. *Puran Nath* (*Mohunt*) (1915), 42 I. A. 115; 37 All. 298; 19 C. W. N. 718; 17 Bom. L. R. 475; *Ram Parkash Das* (*Mohunt*) v. *Anand Das* (*Mohunt*) (1816), 43 I. A. 73; 43 Calc. 707; 20 C. W. N. 802; 18 Bom. L. R. 490; *Ramji Dass* (*Mahanth*) v. *Lachhu Dass* (1902), 7 C. W. N. 145; *Rangachariar* v. *Yegna Dikshatur* (1890), 13 Mad. 524, at p. 534; *Sitapershad* v. *Thakur Dass* (1879), 5 C. L. R. 73; *Gajapati* v. *Bhagavan Das* (1891), 15 Mad. 44; *Basdeo* v. *Gharib Das* (1890), 13 All. 256; *Raj Krishna Dey* v. *Bipin Behary Dey* (1912), 40 Calc. 245; 17 C. W. N. 591.

[6] *Genda Puri* v. *Chhatar Puri* (1886), 13 I. A. 100, at p. 105; 9 All. 1, at p. 8; *Ramji Dass* (*Mahanth*) v. *Lachhu Dass* (1902), 7 C. W. N. 145.

The same principle is applicable to the *dharmakarta* [1] of a *devasthanam* or temple.[2]

In one case an unbroken usage for nineteen years was held conclusive evidence of a family arrangement for turns of management.[3]

As to a temple belonging to the Ballavacharya Gossain sect, see *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1913), 40 I. A. 97; 35 All. 283; 17 C. W. N. 740; 15 Bom. L. R. 606.

As to the appointment of *mohunts*, see *post*. pp. 571, 572.

There may be an hereditary right of managership or *sebaitship*. Hereditary right.

Such right only applies when the person in question is qualified to perform the duties of the office.[4]

Such right must be proved.[5] It may have been provided for in the grant, as is usual in the case of a private religious endowment,[6] or may be established by usage.

In providing for the succession by inheritance to the management of an endowment the rules laid down in the *Tagore* case,[7] prohibiting the creation of estates of inheritance inconsistent with the general law of inheritance, apply.[8]

Where the right to manage a religious or charitable endowment, without any beneficial interest in the endowed properties, is vested in a joint Hindu family the senior male member of such a family is, until a partition is effected,[9] entitled to exercise the right.[10]

In a family governed by the Mitakshara school of law, when the right of management of the *debutter* property belongs to the family, a member of the family becomes on birth entitled to be *shebait*.[11]

In the absence of custom an hereditary priestly office apparently descends in default of males through females.[12] Females.

A female cannot be *archaka* in a Saivite temple.[13]

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1 Manager.

2 *Ramalingam Pillai* v. *Vythilingam Pillai* (1893), 20 I. A. 150; 16 Mad. 490; *Appasami* v. *Nagappa* (1884), 7 Mad. 499.

3 *Ramanathan Chetti* v. *Murugappa Chetti* (1906), 33 I. A. 139; 29 Mad. 283; 10 C. W. N. 825.

4 See *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1913), 40 I. A. 97; 35 All. 283; 17 C. W. N. 740; 15 Bom. L. R. 606; *Sundarambal Ammal* v. *Yogavanagurukkal* (1914), 38 Mad. 850.

5 *Appasami* v. *Nagappa* (1884), 7 Mad. 499.

6 *Collector of Moorshedabad* v. *Shibessuree* (*Ranee*) (1872), 11 B. L. R. 86, at p. 116; 18 W. R. C. R. 226, at p. 228.

7 *Juttendromohun Tagore* v. *Ganendro Mohun Tagore* (1872), I. A. Sup. Vol. 47, at p. 65; 9 B. L. R. 377, at pp. 394, 395; 18 W. R. C. R. 359, at p. 364, *ante*, p. 532.

8 *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1899), 27 I. A. 69, at p. 78; 2 Mad. 271, at p. 281; 4 C. W. N. 329, at p. 332; 2 Bom. L. R. 597.

9 As to partition, see *post*, p. 575.

10 *Thandavaroya Pillai* v. *Shunmugam Pillai* (1908), 32 Mad. 167. See *Purappavanalingam Chetti* v. *Nullasivan Chetti* (1863), 1 Mad. H. C. 415, at p. 417.

11 *Ramchandra Panda* v. *Ram Krishna Mahapatra* (1906), 33 Calc. 507.

12 *Sitarambhat* v. *Sitaram Ganesh* (1869), 6 Bom. H. C. A. C. 250; see *ante*, p. 557.

13 *Sandarambal Ammal* v. *Yogavanagarukkal* (1914), 38 Mad. 850.

For instances of hereditary trustees of religious endowments, see *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1899), 27 I. A. 69; 23 Mad. 1; 4 C. W. N. 329; 2 Bom. L. R. 597; *Nanabhai* v. *Shriman Goswami Girdhariji* (1888), 12 Bom. 331; *Annasami Pillai* v. *Ramakrishna Mudaliar* (1900), 24 Mad. 219.

Section 63 of the Madras Court of Wards Act (I. (Mad. C.) of 1902) is as follows:—

Powers of Court in regard to religious endowments of which ward is hereditary trustee or manager.

If a ward is the hereditary trustee or manager of a temple, mosque, or other religious establishment or endowment, the Court, notwithstanding anything contained in s. 22 of the Religious Endowments Act, 1863,[1] may make such arrangements as it thinks fit for the discharge, during the wardship, of the ward's duties as trustee or manager, provided that for the direct and personal management of the religious affairs of any such institution, establishment, or endowment the Court shall appoint suitable persons other than officers of Government, and that the Court shall, as far as possible, restrict superintendence to the preservation of the property belonging to the institution, establishment, or endowment.

The instructions to Collectors and Estate Collectors on this subject are to be found in Standing Order 155 of the Madras Court of Wards.

Powers of manager as to appointment.

A *mohunt* or other head of an endowment cannot alter the succession,[2] nor can he provide for the succession after the person appointed by him.[3]

Right of founder.

In the absence of express provision in the grant, or of usage, or in the case of omission by the person entitled to nominate to the office the right to nominate a manager or *shebait* reverts to the founder or his heirs.[4]

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[1] XX. of 1863, *post*, p. 595.

[2] *Ramji Dass* (*Mahanth*) v. *Lachhu Dass* (1902), 7 C. W. N. 145; *Rumun Doss* (*Mohunt*) v. *Ashbul Doss* (*Mohunt*) (1864), 1 W. R. C. R. 160.

[3] *Greedharee Doss* v. *Nundkishore Dutt Mohunt* (1863), Marsh, 573; 2 Hay, 633; approved on appeal (1867), 11 M. I. A. 405, at p. 428; 8 W. R. P. C. 25.

[4] *Greedhareejee* (*Gossamee Sree*) v. *Rumanlolljee Gossamee* (1889), 16 I. A. 137; 17 Calc. 3 (public religious endowment); *Sheoratan Kunwari* v. *Ram Pargash* (1896), 18 All. 227 (public temple); *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (1906), 28 All. 689 (ditto); *Mohan Lalji* v. *Madhsudan Lala* (1910), 32 All. 461 (ditto); *Sheo Prasad* v. *Aya Ram* (1907), 29 All. 663 (Sikh religious endowment); *Jai Bansi Kunwar* (*Mussamat*) v. *Chattar Dhari Sing* (1870), 5 B. L. R. 181; S. C. *Peet Koonwur* v. *Chuttur Dharee Singh* (1870), 13 W. R. C. R. 396 (temple); *Hori Dasi Debi* v. *Secretary of State* (1879), 5 Calc. 229; 4 C. L. R. 77; S. C. on appeal *Ram Lal Mookerjee* v. *Secretary of State* (1881), 8 I. A. 46; 7 Calc. 304; 10 C. L. R. 349 (charitable endowment); *Jagannath Prasad Gupta* v. *Runjit Singh* (1897), 25 Calc. 355 (endowment for idol); *Jagadindra Nath Roy Bahadur* (*Maharajah*) v. *Hemanta Kumari Debi* (*Rani*) (1904), 31 I. A. 203, at p. 208; 32 Calc. 129, at p. 399; 8 C. W. N. 809, at pp. 818, 819; 6 Bom. L. R. 765; *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1913), 40 I. A. 97; 35 All. 283; 17 C. W. N. 740; 15 Bom. L. R. 606; *Gopal Chunder Bose* v. *Kartick Chunder Dey* (1902), 29 Calc. 716; *Kunjamani Dasi* v. *Nikunja Bihari Das* (1915), 20 C. W. N. 314; *Gauranga Sahu* v. *Sudevi Mata* (1917), 40 Mad. 612.

The right of management of family properties devoted to charities ordinarily descends to the heirs of the donor except in the few cases where the office is descendible to a single heir.[1]

When the family of the *shebait* appointed by the founder dies out, the *shebaitship* would revert to the family of the original grantor.[2]

Failing an appointment by the person entitled to appoint the Court will appoint.[3]

Prescriptive right.

A right as manager or to appoint a manager may be acquired by prescription.[4]

Appointment of mohunt.

The practice as to the appointment of *mohunts* or other heads of *mutts* or *muttams* (monasteries) varies in accordance with the custom of the particular institution, which must be proved by evidence in each case.[5]

As to evidence of the fact of election, see *Lahar Puri* v. *Puran Nath* (1915), 42 I. A. 115; 37 All. 298; 19 C. W. N. 718; 17 Bom. L. R. 475.

Usually one of the *chelas*, *i.e.* persons initiated by the deceased or retiring *mohunt*, would be selected,[6] by act *inter vivos* or by will[7] by the head of the mutt, such appointment being generally subject to confirmation by the *mohunts* of neighbouring *mutts* of the same sect.[8] On failure of such

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1 *Sethuramaswamiar* v. *Meruswamiar* (1909), 34 Mad. 470.

2 *Raj Krishna Dey* v. *Bipin Behary Dey* (1912), 40 Calc. 251; 17 C. W. N. 591; *Madhub Chandra Bera* v. *Sarat Kumari Debi* (*Srimati Rani*) (1910), 15 C. W. N. 126; *Pital Das Babaji* v. *Protap Chandra Sarma* (1909), 11 C. L. J. 2.

3 *Raj Krishna Dey* v. *Bipin Behary Dey* (1912), 40 Calc. 251; 17 C. W. N. 591, which see as to the principles which will guide the Court in making an appointment.

4 *Annasami Pillai* v. *Ramakrishna Mudaliar* (1900), 24 Mad. 219; *Ramanathan Chetty* v. *Muragappa Chetty* (1903), 27 Mad. 192; S. C. on appeal (1906), 33 I. A. 139; 29 Mad. 283; 10 C. W. N. 824; 8 Bom. L. R. 498; see *Damodar Das* v. *Lakhan Das* (*Adhikari*) (1910), 37 I. A. 147; 37 Calc. 885; 14 C. W. N. 889; 12 Bom. L. R. 632.

5 *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1867), 11 M. I. A. 405; 8 W. R. P. C. 25; *Genda Puri* v. *Chatar Puri* (1886), 13 I. A. 100; 9 All. 1; *Ramalingam Pillai* v. *Vythilingam Pillai* (1893), 16 Mad. 490; *Ramji Dass* (*Mahanth*) v. *Lachhu Dass* (1902), 7 C. W. N. 145; *Lahar Puri* v. *Puran Nath* (1915), 42 I. A. 115; 37 All. 290; 19 C. W. N. 718; 17 Bom. L. R. 475.

6 See *Gunes Gir* v. *Amrao Gir* (1807), 1 Ben. Sel. R. 218 (2nd ed., 291); *Ramji Dass* (*Mahanth*) v. *Lachhu Dass* (1902), 7 C. W. N. 145; *Sheoprokash Dass* (*Mohunt*) v. *Joyram Doss* (1866), 5 W. R. M. A. 57.

7 Probate of such will is not necessary, *Baisnav Charan Das Bairagi* v. *Kishore Dass Mohanta* (1911), 15 C. W. N. 1014.

8 *Ramji Dass* (*Mahanth*) v. *Lachhu Das* (1902), 7 C. W. N. 145; *Land Agents of Zillah Hoogly* v. *Kishnanund Dundee*, Ben. S. D. A. 1848, p. 253; *Greedharee Doss* v. *Nundokissore Doss Mohunt* (1867), 11 M. I. A. 405; 8 W. R. P. C. 25; *Trimbakpuri Guru Sitalpuri* v. *Gangabai* (1887), 11 Bom. 514; *Ramalingam Pillai* v. *Vythilingam Pillai* (1893), 20 I. A. 150; 16 Mad. 490; *Madho Das* v. *Kamta Das* (1878), 1 All. 519; *Rama Nooj Doss* (*Mohunt*) v. *Debraj Doss* (*Mohunt*) (1839), 6 Ben. Sel R. 262 (new edition, 328).

appointment the appointment would usually be made by such neighbouring *mohunts*.[1]

The ordinary rule is that among the *Sanyasis* generally no *chela* has a right as such to succeed to the property of the deceased *guru*; he must be nominated by his *guru*, such nomination being generally confirmed by the *mohunts* of the order, or in default of such appointment, he must be elected by the *mohunts* and principal persons of the sect in the neighbourhood. But this is not a universal rule, and in some cases, according to custom, the principal *chela* succeeds as of right even without such appointment or formal election; but apparently even then an election or a recognition by members of the sect is necessary.[2]

In one case it was said, "The ordinary rule is that the *maths* of the same sect in a district, or *maths* having a common origin, are associated together, the *mohunts* of these acknowledging one of their number (who is for some reason pre-eminent) as a head; and on the occasion of the death of one the others assemble to elect a successor out of the *chelas* or disciples of the deceased, if possible; or if there be none of them qualified, then from the *chelas* of another *mohunt*. After the election the chosen disciple is installed on the *guddi* of his predecessor with much ceremony."[3]

In one case[4] the mohunt's power to appoint his successor was limited to members of the *Adhinam*,[5] a disciple of which founded the *mutt* in question.

There is authority that in the absence of a duly appointed *mohunt* the disciples of a *mutt* cannot sue for a declaration that a person claiming the office has not been duly appointed,[6] but it is submitted that the refusal of relief in such a suit might compel an appointment which might afterwards turn out to be infructuous.

Condition.

Except where he is justified by the terms of the endowment in making an appointment, a *mohunt* has no power to attach any condition to the interest to be enjoyed by his appointee.[7]

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[1] See *Gunes Gir* v. *Amrao Gir* (1807), 1 Ben. Sel. R. (2nd ed., 291); *Dhunsing Gir* v. *Mya Gir* (1806), 1 Ben. Sel. R. 153 (2nd ed., 202); *Ramrutun Das* v. *Bunmalee Das* (1806), 1 Ben. Sel. R. 170 (2nd ed., 202); *Narain Das* v. *Brindabun Das* (1815), 2 Ben. Sel. R. 151 (new edition, 192); *Madho Das* v. *Kamta Das* (1878), 1 All. 539. The Court of Sudder Dewany Adalut in Bengal ordered an assembly of mohunts to be convened to determine a right of succession (*Surubanund Purbut* v. *Deo Sing Purbut* (1810), 1 Ben. Sel. R. 296 (2nd ed., 396), and to instal the person in whom the right might be vested (*Gangu Das* v. *Taluk Das* (1810), 1 Ben. Sel. R. 309 (2nd ed., 414). Such procedure is scarcely possible at the present time.

[2] *Ramdhan Puri* (*Gossain*) v. *Dalmir Puri* (*Gossain*) (1909), 14 C. W. N. 191; see *Gopal Dass* (*Mohunt*) v. *Kerparam Dass* (*Mohunt*), Ben. S. D. A. 1850, p. 250.

[3] *Dowlut Geer* (*Gossain*) v. *Bissessur Geer* (1873), 19 W. R. C. R. 215; H. H. Wilson's "Religion of Hindus," p. 51; *Narain Das* v. *Brindabun Das* (1815), 1 Ben. Sel. R. 151 (new edition, 192).

[4] *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1887), 10 Mad. 375.

[5] A religious institution.

[6] *Srinivasa Swami* v. *Ramanuja Chariar* (1890), 22 Mad. 117. See, however, *post*, p. 577, note 10.

[7] *Greedharee Doss* v. *Nundkishore Dutt Mohunt* (1863), Marsh, 573; 2 Hay, 633; affirmed on appeal, 11 M. I. A. 405; 8 W. R. P. C. 25. See *Gajapati* v. *Bhagavan Doss* (1891), 15 Mad. 44, at p. 45.

Alienation.

Except it be justified by the terms of the endowment or by usage,[1] a right of management,[2] or a trust or a power of appointment of a trustee or manager,[3] or an office attached to a temple or other endowment,[4] cannot be alienated or devised [5] by the holder.

Alienation of management or trust or office.

A disqualified person, such as a female or a non-Hindu, cannot delegate the office.[6]

No proof of usage will justify an alienation for the pecuniary benefit of the alienor,[7] or for the purpose of altering the form of worship.[8]

A right to receive offerings,[9] or a turn of worship [10] is not ordinarily alienable.

Under special circumstances the alienation of religious offices and rights of worship to persons standing in the line of succession and capable of

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[1] See *Rajaram* v. *Ganesh* (1898), 23 Bom. 131, followed in *Manjunath* v. *Shankar* (1914), 16 Bom. L. R. 593; *Rangasami* v. *Ranga* (1892), 16 Mad. 146.

[2] *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 34 Calc. 818; 11 C. W. N. 782; S. C. 35 Calc. 226; 12 C. W. N. 323.

[3] *Gnasambanda Pandara Sannadhi* v. *Velu Pandaram* (1899), 27 I. A. 69; 2 Mad. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; *Vurmah Valia (Rajah)* v. *Vurmah Mutha (Ravi)* (1876), 4 I. A. 76; 1 Mad. 235; *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 34 Calc. 828; 11 C. W. N. 782; S. C. 35 Calc. 226; 12 C. W. N. 323; *Rup Narain Singh* v. *Junko Bye* (1878), 3 C. L. R. 112; *Rama Varma Tambaran* v. *Raman Nayar* (1882), 5 Mad. 89; *Subbarayudu* v. *Kotayya* (1892), 15 Mad. 389; *Kannan* v. *Nilakandan* (1884), 7 Mad. 337; *Alagappa Mudaliar* v. *Sivarasundara Mudaliar*, 15 Mad. 211.

[4] *Lakshmanaaswami Naidu* v. *Rangamma* (1902), 26 Mad. 31; *Keyake Ilata Kotel Kanni* v. *Yadattil Vellayangot* (1868), 3 Mad. H. C. 380; *Narayana* v. *Ranga* (1891), 15 Mad. 183; *Mallika Dasi (Srimati)* v. *Ratanmani Chakervarti*, 1 C. W. N. 493.

[5] *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 34 Calc. 818; 11 C. W. N. 782; S. C. 35 Calc. 226; 12 C. W. N. 323.

[6] *Sundarambal Ammal* v. *Yogavanagurukkal* (1914), 38 Mad. 850.

[7] *Vurmah Valia (Rajah)* v. *Vurmah Mutha* (1876), 4 I. A. 76; 1 Mad. 235; *Narasimha Thatta Acharya* v. *Anantha Bhatta* (1881), 4 Mad. 391; *Kuppa Gurukal* v. *Dorasami Gurukal* (1882), 6 Mad. 76; *Sundarambal Ammal* v. *Yogavanagurukkal* (1914), 38 Mad. 850.

[8] *Venkatarayar* v. *Srinivasa Ayyangar* (1872), 7 Mad. H. C. 32.

[9] *Puncha Thakur* v. *Bindeshri Thakur* (1915), 19 C. W. N. 580. Cf. *Sukh Lal* v. *Bishambhar* (1916), 39 All. 196. As to the alienation of the income of a temple, see *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* (1916), 40 Mad. 212, at p. 222..

[10] *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 34 Calc. 818; 11 C. W. N. 782; S. C. 35 Calc. 226; 12 C. W. N. 323; *Ukoor Doss* v. *Chunder Sekur Doss* (1865), 3 W. R. C. R. 152. See *Durga Bibi* v. *Chanchal Ram* (1881), 4 All. 81. In *Jati Kar* v. *Mukunda Deb* (1911), 39 Calc. 227; 16 C. W. N. 129, effect was given to a transfer which has been acted upon for twenty-five years. A custom permitting such alienation was proved in *Mohamaya Debi* v. *Haridas Haldar* (1914), 42 Calc. 455; 19 C. W. N. 208. This was a case of turns of worship at a public temple (Kalighat, near Calcutta).

performing the worship and other functions connected with it will be upheld if there be no impropriety in the transaction.[1] Such alienation would frequently amount to nothing more than a renunciation of the right.[2]

An assignment for the purpose of carrying on the *debsheba* [3] and making provision therefor has been upheld.[4]

A transfer to a *de jure* manager by a *de facto* manager who has acquired a right to the property by prescription will be upheld.[5]

A right to set aside an assignment may be barred by the law of limitation.[6]

When an alienation is permissible, the form of it is immaterial.[7]

Limits of alienation.

When a right of management or an office connected with an endowment is alienable, it can only be alienated in such a way that the trust may be carried out.[8]

Revocation of endowment of idol.

An endowment in favour of a family idol is not so permanent as a public endowment.[9] Provided that the concurrence of all the members of the family can be obtained, the idol and its property can be transferred to another family for the purpose of carrying on the worship,[10] and there is authority that with the consent of the whole family the dedicated property can be converted into secular property and appropriated by the members of the family.[11]

Attachment.

A right of management or of trusteeship,[12] an office connected with a temple or other endowment,[13] or a right of

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[1] *Mancharam* v. *Pranshankar* (1882), 6 Bom. 298; *Sitarambhat* v. *Sitaram Ganesh* (1869), 6 Bom. H. C. 250; *Baroda Charan Dutt* v. *Hemlata Dassi* (1908), 13 C. W. N. 642; *Nirod Mohini Dassi* v. *Shibodas Pal Dewasin* (1909), 36 Calc. 975; 13 C. W. N. 1084. See, however, *Narayana* v. *Ranga* (1891), 15 Mad. 183.

[2] See *Sitarambhat* v. *Sitaram Ganesh* (1869), 6 Bom. H. C. A. C. 250.

[3] The worship of the deity.

[4] *Jadubindu Odhikaree* v. *Lokenauth Geree* (1863), Marsh, 303; 2 Hay, 160; *Khetterchunder Ghose* v. *Hari Das Bundopadhya* (1890), 17 Calc. 557.

[5] See *Annasami Pillay* v. *Ramakrishna Mudaliar* (1900), 24 Mad. 219.

[6] See *Kannan* v. *Nilakandan* (1884), 1 Mad. 337.

[7] See *Jati Kar* v. *Mukunda Deb* (1911), 39 Calc. 227; 16 C. W. N. 129.

[8] See *ante*, p. 559.

[9] *Ante*, pp. 548, 549.

[10] *Khetterchunder Ghose* v. *Hari Das Bundopadhya* (1890), 17 Calc. 557, followed in *Baroda Charan Dutt* v. *Hemlata Dassi* (1908), 13 C. W. N. 242.

[11] *Doorganath Roy (Konwar)* v. *Ram Chunder Sen* (1876), 4 I. A. 52, at p. 58; 2 Calc. 341, at p. 347; *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (1907), 12 C. W. N. 98. See *Madhub Chandra Bera* v. *Sarat Kumari Debi (Srimati Rani)* (1910), 15 C. W. N. 126; *Dharma Das Mandol* v. *Gosta Behary Mandol* (1911), 16 C. W. N. 29.

[12] *Durga Bibi* v. *Chanchal Ram* (1881), 4 All. 81; *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (1867), 7 W. R. C. R. 266.

[13] *Rajaram* v. *Ganesh* (1898), 23 Bom. 131; *Dubo Misser* v. *Srinibas Misser* (1870), 5 B. L. R. 617; 14 W. R. C. R. 409; *Govind Lakshman Joshi* v. *Ramkrishna Hari Joshi* (1887),

worship,[1] or the right of an idol to receive voluntary offerings,[2] cannot be attached or sold in execution of a decree.[3]

A right to the surplus profits of the *sheba* cannot be attached if the amount be not ascertained.[4]

There is no objection to the sale of the right, title, and interest of a servant of the temple in land belonging to the temple which he holds as remuneration for his services.[5]

Public endowments and religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns, and of allowing alienation within certain restrictions.[6] Partition.

A right to manage a family idol, a temple, or religious endowment, when such right belongs to a coparcenary, may be partitioned by allotting to the coparceners an alternate recurring period of worship or holding in proportion to their shares, if the nature of the endowment renders it possible.[7] Mode of allotment.

The Court will give effect to a family arrangement for the due execution of the service of the temple in turn or in some settled order or sequence.[8] In one case, where there were two idols belonging to the family, an arrangement by which one of the heirs took one of the idols and the property endowed for the worship thereof, and the other took the other idol and property, was approved by the Court.[9]

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12 Bom. 366; *Durga Bibi* v. *Chanchal Ram* (1881), 4 All. 81. See *Jalandhar Thakur* v. *Jharula Das* (1914), 4 I. A. 267; 42 Calc. 244; 18 C. W. N. 1029; 16 Bom. L. R. 845.

1 *Kalicharan Gir Gossain* v. *Bangshi Mohan Das Baboo* (1871), 6 B. L. R. 727; 15 W. R. 339.

2 *Shoilojanund Ojha* v. *Peary Charan Dey* (1902), 29 Calc. 470; 6 C. W. N. 728.

3 Acts V. of 1908 (Civil Procedure Code), s. 60; XIV. of 1882 (Civil Procedure Code), s. 266.

4 *Juggurnath Roy Chowdhry* v. *Kishen Pershad Surmah* (1867), 7 W. R. C. R. 266.

5 *Lotlikar* v. *Wagle* (1882), 6 Bom. 596.

6 *Trimbak* v. *Lakshman* (1895), 20 Bom. 495, at p. 501. See *ante*, p. 574.

7 *Sethuramaswamiar* v. *Meruswamiar* (1909), 34 Mad. 470; *Rajeshwar Mullick* v. *Gopeshwar Mullick* (1907), 34 Calc. 828; 11 C. W. N. 782; *Mancharam* v. *Pranshankar* (1882), 6 Bom. 298; *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1874), 14 B. L. R. 166; 22 W. R. C. R. 437; *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193; Bhattacharya's "Law of the Joint Hindu Family," pp. 452, 453. As to the law of limitation, see Act IX. of 1908, Sched. 1, Art. 131; *Eshan Chunder Roy* v. *Monmohini Dassi* (1878), 4 Calc. 683; *Gopee Kissen Gossamy* v. *Thakoor Doss Gossamy* (1882), 8 Calc. 807; 10 C. L. R. 439; *Gaur Mohan Chowdhry* v. *Madan Mohan Chowdhry* (1871), 6 B. L. R. 352; 15 W. R. C. R. 29; *Nubkissen Mitter* v. *Hurrischunder Mitter* (1818), 2 Morley's Dig. 146.

8 *Ramanathan Chetti* v. *Murugapa Chetti* (1906), 33 I. A. 139; 29 Mad. 283; 10 C. W. N. 824; 8 Bom. L. R. 998.

9 *Elder widow of Raja Chutter Sein* v. *Younger widow of Raja Chutter Sein* (1807), 1 Ben. Sel. R. 180 (new edition, 239).

In a Bombay case [1] the High Court on a partition gave the custody of the family idol and of the property appertaining thereto to the senior member of the family, reserving to the other members a right of access; but it is ordinarily the practice to allot to each of the coparceners the worship and custody in "*palas*" or turns.[2] It is submitted that the latter practice is the right one.

There is nothing to prevent an offering by a particular member of the family, although it may not be his turn of worship at the time.[3]

As to the partition of places of worship and sacrifice and property dedicated to an idol or to other religious or charitable purposes, see *ante*, p. 342.

Suits.

Suit for breach of trust.

Persons interested in a religious or charitable endowment, such as worshippers [4] or devotees of an idol or members of the founder's family,[5] are entitled to bring a suit complaining of a breach of trust with reference to the funds or property belonging to the endowment,[6] or insisting upon the worship being properly performed,[7] or the trust carried out.[8]

They can also sue for a declaration that the *mohunt* or *shebait* or other manager of the endowment has by his maladministration disqualified himself from holding the office.[9]

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[1] *Damodardas Maneklal* v. *Uttamram Maneklal* (1892), 17 Bom. 271, at p. 288.

[2] See *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (1874), 14 B. L. R. 166; 22 W. R. C. R. 437; *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193. The refusal to deliver up the idol to a person entitled to a turn gives a right of suit; *Debendro Nath Mullick* v. *Odit Churn Mullick* (1878), 3 Calc. 390; *Anund Moyee Chowdhrain* v. *Boykantnath Roy* (1867), 8 W. R. C. R. 193; *Gaur Mohan Choudhry* v. *Madan Mohun Chowdhry* (1871), 6 B. L. R. 352; 15 W. R. C. R. 29; *Eshan Chunder Roy* v. *Monmohini Dassi* (1878), 4 Calc. 683; *Gopee Kishen Gossamy* v. *Thakoordass Gossamy* (1882), 8 Calc. 807; 10 C. L. R. 439. K. K. Bhattacharya's "Law of Joint Hindu Family," p. 462.

[3] *Sona Dei* v. *Fakir Chand* (1913), 35 All. 412.

[4] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1897), 24 Calc. 418; *Jugal Kishore* v. *Lakshmandas Raghunathdas* (1899), 23 Bom. 657; *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (1888), 15 Bom. 612. This will include priests worshipping on behalf of pilgrims at a shrine; *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 12 Bom. 247; S. C. on appeal *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N. 23; 2 Bom. L. R. 516.

[5] *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (1888), 15 Bom. 612.

[6] *Radhabai* v. *Chimnaji* (1878), 3 Bom. 27. See *Sathappayyar* v. *Periasami* (1890), 14 Mad. 1.

[7] See *Dhadphale* v. *Gurav* (1881), 6 Bom. 122; *Thackersey Dewraj* v. *Hurbhum Nursey* (1883), 8 Bom. 432.

[8] *Ram Narain Singh* v. *Ramoon Paurey* (1874), 23 W. R. C. R. 76; *Panchcowrie Mull* v. *Chumroolall* (1878), 3 Calc. 563; 2 C. L. R. 121; *Brojomohun Doss* v. *Hurrololl Doss* (1880), 5 Calc. 700; 6 C. L. R. 58; *Hemangini Dasi* v. *Nobin Chand Ghose* (1882), 8 Calc. 788; 11 C. L. R. 370.

[9] See *Mohun Dass* v. *Lutchmun*

The plaintiff's right to an account in such a suit depends upon his pleading and proving a distinct breach of trust.[1] Account.

Section 92 of the Civil Procedure Code[2] enacts as follows:— Suit with respect to public endowments.

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes[3] of a charitable or religious nature, or where the direction of the Court is deemed necessary[4] for the administration of any such trust, the Advocate-General, or two or more persons[5] having an interest in the trust[6] and having obtained[7] the consent in writing of the Advocate-General[8] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

"(*a*) removing any trustee;[9]

"(*b*) appointing a new trustee;[10]

Dass (1880), 6 Calc. 11; 6 C. L. R. 265; *Thackersey Dewraj* v. *Hurbhum Nursey* (1883), 8 Bom. 432; *Sathappayar* v. *Periasami* (1890), 14 Mad. 1; *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (1888), 15 Bom. 612.

[1] *Brojomohun Doss* v. *Hurrololl Doss* (1880), 5 Calc. 700; 6 C. L. R. 58.

[2] Act V. of 1908. This section re-enacts with some alteration, s. 539 of Act XIV. of 1882.

[3] *Sathappayar* v. *Periasami* (1890), 14 Mad. 1; *Jugalkishore* v. *Lakshmandas Raghunathdas* (1899), 23 Bom. 659. As to what is a public trust, see *post*, p. 585.

[4] See *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at p. 809; 10 C. W. N. 581, at p. 590.

[5] A suit instituted by one plaintiff cannot be put right by the addition of another plaintiff, *Darves Haji Mahomed* v. *Jainudin* (1906), 30 Bom. 603; 8 Bom. L. R. 751.

[6] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1897), 24 Calc. 418; *Jugalkishore* v. *Lakshmandas Raghunathdas* (1899), 23 Bom. 659; *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (1887), 12 Bom. 249; S. C. on appeal *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (1899), 26 I. A. 199; 24 Bom. 50; 4 C. W. N. 23; 2 Bom. L. R. 516; *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (1888), 15 Bom. 612.

[7] Consent after the institution of the suit is not sufficient, *Gopal Dei* v. *Kanno Dei* (1903), 26 All. 162, differing from *Ramayyangar* v. *Krishnayyangar* (1886), 10 Mad. 185.

[8] The consent must authorize the persons by name, *Gopal Dei* v. *Kanno Dei* (1903), 26 All. 162, and cannot include matters outside the terms of the consent, *Hussein Miyan (Sayad)* v. *Collector of Kaira* (1895), 21 Bom. 257.

[9] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1897), 24 Calc. 418. See *Damodhar Bhat* v. *Bhogilal* (1899), 24 Bom. 45. This applies to a *de facto* as well as to a *de jure* trustee, see *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at pp. 805, 806; 10 C. W. N. 581, at pp. 587, 589; and the fact that the *de jure* trustee has lost his right by the law of limitation does not prevent a suit, *Lakshmandas Raghunathdas* v. *Jugal Kishore* (1896), 22 Bom. 216. Where the alienation of property is the ground of removal it is not necessary to make the alienee a party, *Huseni Begum* v. *Collector of Moradabad* (1897), 20 All. 46.

[10] This includes the case where the defendant is not the lawful trustee, and the trusteeship is therefore vacant, see *Neti Rama Jogiah* v *Venkatacharulu* (1902), 26 Mad. 450. See, however, *Srinivasa Swami* v. *Ramanuja Chariar* (1890), 22 Mad. 117. It is not necessary to claim consequential relief (Act I. of 1877, s. 42), *Rama Jogiah* v. *Venkatacharulu* (1902), 26 Mad. 450. New

"(c) vesting any property in a trustee;
"(d) directing accounts and enquiries:[1]
"(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
"(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged, or exchanged;
"(g) settling a scheme;[2] or
"(h) granting such further or other relief as the nature of the case may require.[3]

"(2) Save as provided by the Religious Endowments Act, 1863,[4] no suit claiming any of the reliefs specified in sub-s. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."[5]

This last provision disposes of the decisions which held that the corresponding provisions of the previous Codes of Civil procedure were permissive and not mandatory.

Object of provisions.

Referring to the corresponding section of the previous Code of Civil Procedure,[6] the Bengal High Court said,[7] "The real object of the special provisions of s. 539 seems to us to be clear. Persons interested in any trust were, if they would all join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the district; and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. Where this condition is fulfilled and the risk of harassing suits being brought against trustees is thus guarded against, there is no reason why suits brought under the section should be restricted in any other way."

For a summary of the results of s. 92 of the Civil Procedure Code and of the Religious Endowments Act, see Mullah's "Code of Civil Procedure," 3rd ed., p. 207.

A suit for one of the above purposes, but including a claim for the

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or additional trustees may be appointed, although such appointment may not be in conformity with the original constitution of the trust, *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharlavaru* (1905), 28 Mad. 319.

[1] See *Ghazaffar Husain Khan* v. *Yawar Husain* (1905), 28 All. 112.

[2] A scheme may be framed even with respect to a temple which is subject to the control of a committee; *Sitharama Chetty* v. *Subramania Iyer (Sir S.)* (1915), 39 Mad. 700. The scheme is liable to alteration. *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharlavaru* (1905), 28 Mad. 319; *Damodarbhat* v. *Bhogilal Karsondas* (1899), 24 Bom. 45.

[3] See *Jamal-uddin* v. *Mujtaba Husain* (1903), 25 All. 631, at p. 635; *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at p. 810; 10 C. W. N. 581, at p. 591.

[4] Act XX. of 1863, *post*, pp. 585, *et seq.*

[5] See *Lutifunnissa Bibi* v. *Nazirun Bibi* (1884), 11 Calc. 33; *Wajid Ali Shah* v. *Dianat-ul-lah Beg* (1885), 8 All. 31.

[6] Act XIV. of 1882.

[7] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1897), 24 Calc. 418, at p. 425.

recovery of trust property from the hands of a third party to whom it had been improperly alienated is within this section.[1]

A suit lies against the committee of management of a temple receiving annually from Government a sum of money for the purpose of religious worship by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty.[2]

Cases to which section has no application.

It has been held that this section has no application to—

(*a*) A suit for a declaration that the plaintiff is a trustee.[3]

(*b*) A suit for a declaration of a right of management which is actually being exercised by the plaintiff.[4]

(*c*) A suit for a declaration of the right of the plaintiff to appoint a manager of a *mutt.*[5]

(*d*) A suit between two private parties claiming certain rights as managers.[6]

(*e*) A suit for the declaration of the existence of a trust.[7]

(*f*) A suit by worshippers at a temple for a declaration that the election of certain persons to the office of *dharmakarta*[8] is void.[9]

(*g*) Suits brought not to establish a public right, but to remedy a particular infringement of an individual right.[10]

It has been held that suits not brought for any of the purposes specified in the section "being merely claims by trustees against persons who are strangers to the trust and who set up a title hostile thereto, such as alienees and mere trespassers holding adversely thereto, are not within the section."[11]

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[1] *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (1897), 24 Calc. 418, followed in *Ghazaffar Husain Khan* v. *Yawar Husain* (1905), 28 All. 112. As to whether a separate suit may be necessary to obtain possession, see the last-mentioned case, and *Neti Rama Jogiah* v. *Venkatacharulu* (1902), 26 Mad. 450.

[2] *Trimbak Gopal Parichak* v. *Krishnarao Pandurang* (1909), 33 Bom. 387. See *Attorney General* v. *Brodie* (1846), 4 M. I. A. 191; *Mayor of Lyons* v. *Advocate-General of Bengal* (1875), 3 I. A. 32; 1 Calc. 303; 26 W. R. C. R. 1.

[3] *Miya* v. *Bava Sahab Santi Miya (Sayed)* (1896), 22 Bom. 496; *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at p. 810; 10 C. W. N. 583, at p. 590.

[4] *Navroji Manekji Wadia* v. *Dastur Kharsedji Mancharji* (1903), 28 Bom. 20.

[5] *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1887), 10 Mad. 375.

[6] *Manijan Bibee* v. *Khadem Hossein* (1904), 32 Calc. 273.

[7] *Jamal-uddin* v. *Mujtaba Husain* (1903), 25 All. 631, followed in *Dasondhay* v. *Muhammad Abu Nasar* (1911), 33 All. 660.

[8] Manager.

[9] *Srinivasa Chariar* v. *Raghava Chariar* (1897), 23 Mad. 28.

[10] *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at p. 807; 10 C. W. N. 581, at p. 589; *Jawahra* v. *Akbar Husain* (1884), 7 All. 178, differing from *Jan Ali* v. *Ramnath Mundul* (1882), 8 Calc. 32; 9 C. L. R. 43, see *Lutifunnissah Bibi* v. *Nazirun Bibi* (1885), 11 Calc. 33; *Zafaryab Ali* v. *Bakhtawar Singh* (1883), 5 All. 497; *Mohiuddin* v. *Sayiduddin* (1893), 20 Calc. 810.

[11] *Budree Das Mukim* v. *Chooni Lal Johurry* (1906), 33 Calc. 789, at p. 805; 10 C. W. N. 581, at p. 587; *Ayatunnessa Bibi* v. *Kulfu Khalifa* (1914), 41 Calc. 749; 19 C. W. N. 234; *Strinivasa Ayyangar* v. *Strinivasa Swami* (1892), 16 Mad. 31; *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* (1916), 40 Mad. 212; *Muhammad Abdullah Khan* v. *Kallu* (1899), 21 All. 187; *Malhar Bhagvant* v. *Narasinha Krishna* (1912), 37 Bom. 95; 14 Bom. L. R. 941; *Ghelabai Gavri*.

There is also, throughout India, a summary remedy by a magistrate's order.[1]

Guardians and Wards Act.

Where the husband has already had the custody of his minor wife, and she has left, or is removed from, his custody, there is also a remedy under sec. 25 of the Guardians and Wards Act.[2]

Damages.

The husband is also entitled to recover damages from the person harbouring his wife or enticing her away,[3] whether or not for improper purposes, and to obtain an injunction against such person from interfering with his wife rejoining him.

"Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him." [4]

A suit for damages against a person committing adultery with a wife would also apparently lie.[5]

It is not possible to lay down any exact rule as to the measure of damages in these cases. The principles adopted in English cases might, to some extent, be applied. On the one hand, the Court should consider the loss of the wife's society, affection, services and assistance in domestic affairs, and the social injury (if any) which the husband is likely to suffer from the act complained of. On the other hand, the behaviour of the husband towards his wife may be taken into account. The capacity of the defendant to pay damages is not generally (if ever) a circumstance for consideration.[6]

Rights over Property.

Power of wife over her property.

Except that in times of pressing need he may use his wife's separate property,[7] and that he has in certain cases a right of

[1] Criminal Procedure Code (Act V. of 1898), ss. 100, 552.

[2] VIII. of 1890.

[3] See *Hurka Shunkur* v. *Raeejee Munohur* (1908), 1 Borr. 353.

[4] *Yamunabai* v. *Narayan Moreshvar Pendse* (1876), 1 Bom. 164, at pp. 174, 175. See *Surjyamoni Dasi* v. *Kalikanta Das* (1900), 28 Calc. 37, at p. 43; 5 C. W. N. 195, at p. 200; *Lall Nath Misser* v. *Sheoburn Pandey* (1873), 20 W. R. C. R. 92.

[5] *Soodasun Sain* v. *Lokenauth Mullick* (1859), Montriou's cases of Hindu law, p. 619. Strange's "Hindu Law," vol. i. p. 46, vol. ii. p. 41. See *contrâ*, Macnaghten's "Hindu Law," vol. i. p. 61, and opinions of Colebrooke and Ellis, Strange's "Hindu Law," vol. ii. pp. 40–44.

[6] See *Kelly* v. *Kelly* (1869), 3 B. L. R. O. C. 67.

[7] See *Mohima Chunder Roy* v. *Durga Monee* (1875), 23 W. R. C. R. 184; *Tukaram* v. *Gunaji* (1871), 8 Bom. H. C. A. C. 129; "Mitakshara," chap. ii. s. 11, paras. 32, 33; "Dayabhaga," chap. iv. s. 1, paras. 19–25;

A person holding land assigned for the support of an idol subject to the performance of the ceremonies of worship of the idol who fails to perform the required service may be compelled to do so, and on refusal may be removed.[1]

Grounds for removal.

"Courts of equity in England have always allowed themselves some latitude in dealing with the trustees of a public charity who under a mistake have misapplied the funds of the institution, and we think that we can similarly allow ourselves some degree of latitude in dealing with the managers and *pujaris* [2] of public Hindu temples who for a long time have been accustomed to deem themselves owners of the temples of which in law they are only trustees, managers, and priests, and to overlook the past while taking care that for the future the administration of the temple is placed on a sound footing. The judgment in the *Chinchwad* case,[3] while it established the jurisdiction of the Courts to deal with the managers of public Hindu temples, and, if necessary, for the good of the religious endowment to remove them from their position as managers, did not, we think, intend to lay down a hard and fast rule that every manager of a shrine who arrogated to himself the position of owner should be removed from his trust. . . . Each case must, we think, be decided with reference to its own circumstances." [4]

In the absence of fraud or dishonesty mere misconduct or mistake as to his position does not compel a Court to dismiss a manager.[5] It may in some cases appoint a committee to supervise and control him, and frame a scheme for the management of the trust.[6]

Appointment of successor.

On the removal of the manager a successor would then have to be appointed by the person entitled to make the appointment,[7] and in default of such appointment the Court will appoint a fit successor,[8] or will, if necessary, frame a scheme for the administration of the trust.

As to the power of the Court to appoint new trustees or managers of public religious endowments in cases to which Act XX. of 1863 is applicable, namely, in the case of public religious endowments which might have been taken charge of by the Boards of Revenue under Bengal Regulations XIX. of 1810, and Madras Regulations VII. of 1817, see *post*, p. 583.

Neither the Trustees and Mortgagees Powers Act [9] nor the Trustee Act [10] has any application to charitable or religious trusts.

[1] *Mohesh Chunder Chuckerbutty* v. *Koylash Chunder Chuckerbutty* (1869), 11 W. R. C. R. 443.

[2] Priests.

[3] *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* (1888), 15 Bom. 612.

[4] *Damodar Bhatji* v. *Bhat Bhogilal Kasandas* (1896), 22 Bom. 493, at pp. 494, 495.

[5] *Annaji Raghunath Gosavi* v. *Narayan Sitaram* (1896), 21 Bom. 556; *Sivasankama* v. *Vadagiri* (1889), 13 Mad. 6.

[6] *Annaji Raghunath Gosavi* v. *Narayan Sitaram* (1896), 21 Bom. 556.

[7] *Ante*, pp. 568 *et seq.* As to the form of decree when the person suing is entitled to nominate the successor, see *Sathappayyar* v. *Periasami* (1890), 14 Mad. 1.

[8] See *ante*, p. 571.

[9] XXVIII. of 1866. *Dinsha Manekji Petit (Sir)* v. *Jamsetji Jijibhai (Sir)* (1908), 33 Bom. 509.

[10] II. of 1882. *Gopu Kolandavelu Chetty* v *Sami Royar* (1905), 28 Mad. 517.

Statutory provisions for the Superintendence of Charitable and Religious Endowments.

Bengal Regulation XIX. of 1810.

Bengal Regulation XIX. of 1810 [1] vested in the Boards of Revenue and Commissioners the general superintendence of all lands granted for the support of mosques, Hindu temples, colleges, and for other pious and beneficial purposes, and of all public buildings, such as bridges, *sarais*,[2] *kattras*,[3] and other edifices,[4] and made provisions for giving effect to such superintendence.

Madras Regulation VII. of 1817.

By Madras Regulation VII. of 1817, framed under the above Regulation, the general superintendence of all endowments granted for the support of colleges, or for other beneficial purposes, and of all public buildings, such as bridges, *choultries*,[5] or *chuttrums*,[6] or other edifices in the Madras Presidency, were vested in the Madras Board of Revenue.[7] The general superintendence of escheats was likewise vested in the Board of Revenue.[8]

So far as religious endowments are concerned, these Regulations have been repealed.[9]

These Regulations were intended to be supplemental to existing remedies.[10] They apply to endowments created after the date of the Regulations, as well as to prior endowments.[11]

Appropriation of endowments.

These Regulations [12] require the Board of Revenue,[13] and in the case of Bengal the Board of Commissioners also, to take care that all endowments, the general superintendence of which are vested in them, are duly appropriated to the purpose for which they were destined by the Government or individual by whom such endowments were granted.

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[1] Repealed in Assam by Act V. of 1897, and in the North-Western Provinces by Act VIII. of 1884.

[2] Buildings for the shelter and accommodation of travellers.

[3] Market places.

[4] S. 2.

[5] Shelter for travellers.

[6] Places where refreshment is given gratuitously, especially to Brahmins.

[7] S. 2.

[8] Ben. Reg. XIX. of 1810, s. 7; Mad. Reg. VII. of 1817, s. 6.

[9] *Post*, p. 584.

[10] *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambara* (1872), 7 Mad. H. C. 117.

[11] *Venkatachala Pillai* v. *Taluq Board, Saidapet* (1911), 34 Mad. 375; *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223.

[12] Ben. Reg. XIX. of 1810, s. 3; Mad. Reg. VII. of 1817, s. 3.

[13] In Ajmere the Chief Commissioner discharges the functions of the Board of Revenue, Reg. III. of 1877, s. 3.

There were also provisions [1] as to the repair of public edifices and the disposal of ruined buildings.

They are bound to prevent endowed lands from being appropriated to private uses or in any other mode contrary to the intent and will of the donor.[2] Misappropriation.

There were to be local agents, of whom the Collector was to be one, in each district.[3] Agents.

The duty of the agents is to ascertain and report the particulars of endowments, the names and particulars of the then trustees and managers, and all vacancies and casualties with full information as to the pretensions of claimants, and to recommend fit persons where the nomination vests in Government or any public officer.[4]

The Regulations give power to appoint trustees, managers, and superintendents in those cases in which the nomination has usually rested with the present or former Government, or with a public officer, or of right appertains to Government, in consequence of no private individual being competent and entitled to make sufficient provision for the succession to the trust and management.[5] Appointment of trustees.

Under this provision the Board of Revenue can appoint hereditary trustees when such appointment does not interfere with any subsisting rights.[6] Appointment of trustees.

This provision was not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation.[7]

Section 15 of the Bengal Regulation and s. 14 of the Madras Regulation save the rights of individuals to recover by due course of law lands or buildings which had been appropriated under colour of the Regulations and compensation in damages for any loss or injury unduly sustained by them. Saving of private rights.

The Board cannot arbitrarily put an end to an arrangement permanently Termination of arrangement, or superintendence.

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[1] Ben. Reg. XIX. of 1810, ss. 3, 4, and 6; Mad. Reg. VII. of 1817, ss. 3, 4.

[2] Ben. Reg. XIX. of 1810, s. 5; Mad. Reg. VII. of 1817, s. 5.

[3] Ben. Reg. XIX. of 1810, ss. 8, 9; Mad. Reg. VII. of 1817, ss. 7, 8.

[4] Ben. Reg. XIX. of 1810, ss. 10-13; Mad. Reg. VII. of 1817, ss. 9-12.

[5] Ben. Reg. XIX. of 1810, s. 14; Mad. Reg. VII. of 1817, s. 13. This cannot be done without first dismissing the existing trustee, *Venkatachala Pillai* v. *Taluk Board, Saidapet* (1911), 34 Mad. 375.

[6] *Ganapathi Ayyar* v. *Vedavyasa Alasingha Bhattar (Sri)* (1906), 29 Mad. 534.

[7] *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar* (1872), 7 Mad. H. C. 117.

made by them, but may do so only for just and sufficient reasons.[1] The Board of Revenue can devest itself of its right of superintendence.[2]

Partial repeal of Regulations.

These Regulations still apply to charitable endowments, except in Assam[3] and the North-Western provinces,[4] but so far as religious endowments are concerned, they were repealed by the Religious Endowments Act,[5] which is in force throughout India except in the Presidency towns and the Bombay Presidency, where it is in force in Kanara only.

Religious Endowments Act.

Transfer of management of endowments to Madras Municipal Council and Madras Local Boards.

It is competent to the Madras Board of Revenue, with the written consent of the Governor in Council and of the District Municipal Council, to make over to such municipal council the management and superintendence of any endowment vested in the Board by Madras Regulation VII. of 1817; and thereupon all powers and duties which attach to such Board of Revenue in respect thereof shall attach to such municipal council as if they had been specifically named in such Regulation.[6] There is a similar provision in the Madras Local Boards Act, 1884.[7]

Religious Endowments Act.

The scope of the Religious Endowments Act, 1863,[8] is to be ascertained from the preamble which recites that it is expedient to relieve the Boards of Revenue, and the local agents in the Presidency of Fort William in Bengal, and the Presidency of Fort St. George, from the duties imposed on them by the above Regulations, "so far as these duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments; the repair and preservation of buildings connected therewith, and the appointment of trustees or managers thereof; or involve any connection with the management of such religious establishments."

The Act applies to all public religious endowments for the support of which lands have been granted by preceding Governments of India and

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[1] *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar (Sri)* (1906), 29 Mad. 534.

[2] *Venkatesa Nayudu* v. *Shatagopa Shri Shatagopa Swami (Shrivan)* (1872), 7 Mad. H. C. 77.

[3] Act V. of 1897.

[4] Act VIII. of 1884.

[5] XX. of 1863.

[6] Act IV. (M. C.) of 1884, s. 26 (2), *Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswarlu* (1907), 31 Mad. 111.

[7] Act V. (M. C.) of 1884, s. 51 (2); *Venkatachala Pillai* v. *Taluq Board, Saidapet* (1911), 34 Mad. 375.

[8] XX. of 1863.

by individuals, whether they had been taken under the control of the Board of Revenue or not,[1] and whether they existed at the time of the passing of the Act or have been subsequently created.[2] It applies to religious endowments which might have been taken under the control of the above Regulations, if such Regulations had remained in force,[3] and whether or not they were in existence at the time of the repeal of such Regulations.[4]

Private trusts.

The Act only applies to public trusts. It has no application to private trusts,[5] and only applies to certain religious trusts and endowments which had been or might be under the management of the Government.[6]

Public endowment.

A public endowment for religious uses has been defined [7] as "one which distributes its benefits to all men of all classes professing a defined form of religion: a similar endowment for pious and charitable purposes generally would include all members of the community who chose to avail themselves of the means afforded them by the appropriation; every one would have an equal right to participate, and that at all time and at all seasons." To make a trust a public trust there must be an intention to confer a benefit either upon the people in general or upon a class of sectaries.[8]

For instance, an endowment for the purpose of supporting and maintaining *fakirs*, entertaining visitors, and the giving of alms.[9]

The Act applies to endowments the funds for which have been raised by subscription.[10]

The provisions of the Religious Endowments Act (XX. of 1863) are as follows:—

Transfer of religious trust property to trustees.

In the case of every mosque, temple, or religious establishment subject to the above Regulations which was under the management of a trustee, manager, or superintendent, whose nomination did not vest in, nor was exercised by, or was subject to the confirmation of, the Government, or of any public officer,

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[1] *Jan Ali* v. *Ram Nath Mundul* (1881), 8 Calc. 32; 9 C. L. R. 433; *Sheoratam Kunwari* v. *Ram Pargash* (1896), 18 All. 227; *Mahomed Athar* v. *Ramjan Khan* (1907), 34 Calc. 587.

[2] *Venkatachala Pillai* v. *Taluq Board, Saidapet* (1911), 34 Mad. 375.

[3] See *Saturluri Setaramanuja Charyulu* v. *Nanduri Seetapati* (1902), 26 Mad. 166, explaining *Muthu* v. *Gangathara* (1893), 17 Mad. 95; *Mahomed Athar* v. *Ramjan Khan* (1907), 34 Calc. 587.

[4] *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223; *Venkatachala Pillai* v. *The Taluq Board, Saidapet* (1911), 34 Mad. 375.

[5] See *Sathapayyar* v. *Periasami* (1890), 14 Mad. 1 (endowment for family of *guru*); *Ashgar Ali* v. *Delroos Banoo Begum* (1877), 3 Calc. 325; S. C. in Court below, *Delroos Banoo Begum* v. *Ashgur Ally Khan (Nawab Syud)* (1875), 15 B. L. R. 167; 23 W. R. C. R. 453; *Protap Chandra Misser* v. *Brojonath Misser* (1891), 19 Calc. 275 (endowment for family idol).

[6] *Kalee Churn Giri* v *Golabi* (1878), 2 C. L. R. 129, at p. 131.

[7] *Delroos Banoo Begum* v. *Ashgur Ally Khan (Nawab Syud)* (1875), 15 B. L. R. 167, at p. 184; 23 W. R. C. R. 453, at p. 454. See *Venkatachala Pillai* v. *Taluq Board, Saidapet* (1911), 34 Mad. 375, at pp. 381, 382.

[8] See *Sathapayyar* v. *Periasami* (1890), 14 Mad. 1.

[9] *Puran Atal (Mohunt)* v. *Darshan Das* (1912), 34 All. 468.

[10] *Muhammad Siraj-ul-Haq* v. *Imamud-din* (1896), 19 All. 104.

the local Government was required to transfer the property which was under the superintendence of the Board of Revenue to such manager, trustee, or superintendent.[1]

Procedure in case of dispute as to succession to vacated trusteeship.

When a dispute arises as to the succession to the office of any trustee, manager, or superintendent to whom the property has been so transferred,[2] the Civil Court may at the instance of any person interested in the mosque, temple, or religious establishment or in the performance of the worship or of the service thereof, or of the trusts relating thereto, appoint a manager to act until some other person has by suit established his right of succession to such office.[3]

A Collector can be appointed trustee under this provision.[4]

No appeal lies from an order made under this provision,[5] but a High Court can revise such order.[6]

Rights, powers, and responsibilities of trustees, etc., to whom charge transferred.

The rights, powers, and responsibilities of the trustee, manager, or superintendent to whom the property is so transferred, as well as the conditions of their appointment, election, and removal are the same as if the Act had not been passed except in respect of the liability to be sued under the Act.[7] All the powers which might be exercised by any Board of Revenue or local agent for the recovery of the rent of land or other property so transferred may be exercised by any trustee, manager, or superintendent to whom such transfer is made.[8]

Appointment of Committees.

In the case of every mosque, temple, or religious establishment to which the provisions of either of the above regulations were applicable and the nomination of the trustee, manager, or superintendent whereof was at the time of the passing of the Act vested in, or might be exercised by, the Government or any public officer or in which the nomination was subject to the confirmation of Government or any public officer,[9] the Local

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[1] S. 4. *Jusagheri Gossamiar* v. *Collector of Tanjore* (1870), 5 Mad. H. C. 334.

[2] *Ittuni Panikkar* v. *Irani Nambudripad* (1881), 3 Mad. 401; *Gopala Ayyar* v. *Arunachallam Chetty* (1902), 26 Mad. 85.

[3] S. 5. As to appeals, see *Sultan Ackeni Sahib* v. *Bava Malimiyar* (*Shaik*) (1879), 4 Mad. 295.

[4] *Somasundara Mudaliar* v. *Vythilinga Mudaliar* (1896), 19 Mad. 285.

[5] *Ibid.*

[6] *Gopala Ayyar* v. *Arunachallam Chetty* (1902), 26 Mad. 85.

[7] *Post*, pp. 590–592.

[8] S. 6.

[9] S. 3. See *Sitharama Chetty* v. *Subramania Iyer* (*Sir S.*) (1915), 39 Mad. 700; *Dhurrum Singh Mohunt* v. *Kissen Singh* (1881), 7 Calc. 767; 9 C. L. R. 410. The burden of proof is on the person alleging that the endowment is of the class mentioned in s. 3, if a committee has been appointed and has worked for many

Government was required once for all [1] to appoint committees of three or more persons to exercise the powers [2] given to the Board of Revenues and local agents by the above Regulations.[3]

As to the duties and powers of such committees, see *post*, pp. 589, 590.

"It cannot be contended that, owing to the neglect of Government to carry out the duties imposed upon them by s. 7 of that Act, the Board of Revenue can be deemed to be still invested with the powers and duties which attached to the Board under the Regulations." [4]

Two out of three of the members of a committee so appointed cannot maintain a suit,[5] but a surviving member can do so.[6]

Qualifications for members of such Committee.

The members of the said committee were to be appointed from among persons professing the religion for the purposes of which the mosque, temple, or other religious endowment was founded, or was then maintained, and in accordance, so far as could be ascertained, with the general wishes of those who were interested in the maintenance of such mosque, temple, or other religious establishment. The appointment of the committee was to be notified in the *Official Gazette*. In order to ascertain the general wishes of such persons in respect of such appointment, the Local Government might cause an election to be held under such rules (not inconsistent with the provisions of this Act) as should be framed by such Local Government.[7]

Every member to be appointed for life unless removed for misconduct, etc.

Under s. 9 every member of a committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court as thereinafter provided.[8]

Retirement of member.

A member of a committee can retire from his office of his own will.[9]

Provisions for filling up vacancies.

Section 10.—Whenever any vacancy shall occur among the members of a committee appointed as above, a new member

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years, *Ponduranga* v. *Nagappa* (1889), 12 Mad. 366; *Bhima Rout* v. *Dasarathi Doss* (1912), 40 Calc. 323, at p. 333.

[1] *Rangappa* v. *Bhimappa* (1915), 39 Mad. 349. As to a change for Revenue purposes, see *ibid.*

[2] *Ante*, pp. 582, 583.

[3] S. 7. As to giving consideration in return for votes, see *Krishnaswami Ayyangar* v. *Sivaswami Udayar* (1905), 29 Mad. 166.

[4] *Mahomed* v. *Ganapati* (1889), 13 Mad. 277, at pp. 278, 279.

[5] *Muhammad Hasan (Syed)* v. *Nazar Muhammad (Kazi)* (1916), 1 Pat. L. J. 437.

[6] *Raghunandan Ramanuja Das* v. *Bibhuti Bhusan Mukerjee* (1911), 39 Calc. 304, differing from *Samthalva* v. *Manjanna Shetty* (1910), 34 Mad. 1.

[7] Act XX. of 1863, s. 9. See standing orders of Madras Board of Revenue, Vol. I. chap vi.

[8] *Post*, p. 591.

[9] *Tiruvengada Ayyangar* v. *Rangayyangar* (1882), 6 Mad. 114.

shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided, under rules for elections which shall be framed by the Local Government; and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order the vacancy to be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply, and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy.[1]

When the number is reduced to less than three, it has been held that the remaining members cannot perform any of the functions of the original committee.[2]

The Judge may appoint a new committee when the memberships are all vacant.[3]

There is no appeal from the exercise of the power given to the District Judge by this section,[4] but the matter can be dealt with by the High Court on revision.[5]

No member of committee to be trustee, etc., of mosque, etc., under charge of such committee.

No member of a committee can be or act also as a trustee, manager, or superintendent of the mosque, temple, or other religious establishment for the management of which such committee may have been appointed.

Transfer of property to committee.

On the appointment of the committee the property of the endowment was to be transferred to the committee.[6] All the

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[1] As to the construction of this section, see *Vasudeva Aiyar* v. *Negapatam Devasthanam Committee* (1913), 38 Mad. 594 (upheld on appeal, 21·5·17).

[2] *Santhalva* v. *Manjanna Shetty* (1910), 34 Mad. 1; differed from in *Sitharama Chetty* v. *Subramania Iyer* (*Sir S.*) (1915), 39 Mad. 700, and in *Raghunandan Ramanuja Das* v. *Bibhuti Bhusan Mukerjee* (1911), 39 Calc. 304. See *Muhammad Hasan* (*Syed*) v. *Nazar Muhammad* (1916), 1 Pat. L. J. 437.

[3] *Mahomed Athor* (*Syed*) v. *Sultan Khan* (1900), 4 C. W. N. 527.

[4] *Meenakshi Naidoo* v. *Subraminya Sastri* (1887), 14 I. A. 160; 11 Mad. 26.

[5] *Vasudeva Aiyar* v. *Negapatam Devasthanam Committee* (1913), 38. Mad. 594. A contrary view was entertained in *Subbier* v. *Abhoy Naidu* (1915), 18 Mad. L. J. 671.

[6] *I.e.* the property which was actually in the possession of the Board of Revenue when the Act was passed, *Ponduranga* v. *Nagappa* (1889), 12 Mad. 366, at p. 368.

powers which might be exercised by any Board of Revenue or local agent for the recovery of the rent of land or other property so transferred can be exercised by the committee.[1]

The Act does not detail the powers and duties of the committee. They have apparently general powers of superintendence and control over the affairs of the endowment.[2] In exercising such general control, it is an unquestionable duty of theirs to see that the rents payable to the institutions are punctually collected and all steps legally necessary for their collection are duly taken. In the performance of this duty, however, the procedure to be observed by them is to get the managers to make the collection and perform all acts necessary for the purpose." Taking leases in their own name, though not regular, is not absolutely illegal.[3]

The duty of a *devastanam*[4] committee consists, primarily, in seeing that its endowments are appropriated to their legitimate purposes and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to ritual.[5]

The committee cannot alter the constitution of the temple management established by the Board, and appoint additional trustees where some or all of the trustees are hereditary. The Act does not confer on the committee power, except for good and sufficient cause, to add to the number of trustees sanctioned under an existing scheme even if such trustees are not hereditary.[6] Additional trustees.

They may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, though discretionary, must, as in the case of all powers exercised by them, be exercised reasonably and in good faith, and may be controlled by a Civil Court of original jurisdiction.[7] New trustees.

The committee, or at least a majority thereof,[8] has power to dismiss trusteee and superintendents of temples and of pagodas[9] or to suspend them[10] for due cause and for due cause only.[11] Such dismissal must be at a meeting and after something like a judicial inquiry.[12] Dismissal of trustees, etc.

The procedure of committees should be governed by the rules applicable to regular corporations.[13] Procedure.

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[1] Act XX. of 1863, s. 12.

[2] See *Kaliyanaramayyar* v. *Mustak Shah Sahib* (1896), 19 Mad. 395, at p. 396.

[3] See *Kaliyanaramayyar* v. *Mustak Shah Saheb* (1896), 19 Mad. 395, at p. 397.

[4] Revenue applied to the support of a temple.

[5] *Tiruvengadath Ayyangar* v. *Srinivasa Thathachariar* (1899), 22 Mad. 361.

[6] *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar* (*Sri*) (1906), 29 Mad. 534.

[7] *Davud Saiba* (*Sheikh*) v. *Hussein Saiba* (1893), 17 Mad. 212; *Thiruvengadath Aiyangar* v. *Ponnappiengar* (1914), 38 Mad. 1176; Act II. of 1882 (Trusts), s. 49.

[8] *Pandarungy Annachariyar* v. *Iyathory Mudaly* (1869), 4 Mad. H. C. 443.

[9] *Chinna Rangaiyangar* v. *Subbraya Mudali* (1867), 3 Mad. H. C. 334.

[10] *Seshadri Ayyangar* v. *Nataraja Ayyar* (1898), 21 Mad. 179.

[11] Cases cited in *Bhima Rout* v. *Dasarathi Dass* (1912), 40 Calc. 323, at pp. 333, 334.

[12] *Thandıaraya* v. *Subbayyar* (1899), 23 Mad. 483.

[13] *Anantanarayana Ayyar* v. *Kuttalam Pillai* (1899), 22 Mad. 481. As to a quorum, see *ibid.*

Suits.

They can without leave institute such suits as may be necessary for enforcing their powers,[1] but the trustee or manager is the person who is entitled to bring suits for the property.[2]

Possession of property.

The committee is not entitled to possession of the property of the endowment.[3]

Endowments not vested in Government.

Such committee has no power over trustees of endowments, the appointment of whom is not vested in Government.[4]

Accounts of receipts and disbursements.

The Act further provided—

"Section 13.—It shall be the duty of every trustee, manager, and superintendent of a mosque, temple, or religious establishment to which the provisions of this Act shall apply, to keep regular accounts of his receipts and disbursements in respect of the endowments and expenses of such mosque, temple, or other religious establishment, and it shall be the duty of every committee of management appointed or acting under authority of this Act to require from every trustee, manager, and superintendent of such mosque, temple, or other religious establishment the production of such regular accounts of such receipts and disbursements, at least once in every year, and every such committee of management shall themselves keep such accounts thereof."

Failure to submit accounts to the committee justifies the dismissal of the trustee.[5]

Persons interested may singly sue in case of breach of trust, etc.

"Section 14.—Any person or persons interested in any mosque, temple, or religious establishment, or in the performance of the worship or of the service thereof, or of the trusts relating thereto may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court, the trustees,[6] manager, or superintendent of such mosque, temple,[7] or religious establishment, or the member of any committee appointed under this Act, for any misfeasance, breach of trust,

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[1] See *Venkatasu Naidu* v. *Sadagopasamy Iyer* (1869), 4 Mad. H. C. 404.

[2] *Sankamurti Mudaliar* v. *Chidambara Nadan* (1893), 17 Mad. 143.

[3] *Ponduranga* v. *Nagappa* (1889), 12 Mad. 366.

[4] *Vencatabala Krishna Chettiyar* v. *Kaliyanaramaiyangar* (1869), 5 Mad. H. C. 48; *Ramiengar* v. *Gnasambanda Pandarasannada* (1867), *ibid.* 53.

[5] *Anantanarayana Ayyar* v. *Kuttalam Pillai* (1899), 22 Mad. 481.

[6] Even if he be an hereditary trustee, *Natesa* v. *Ganapati* (1890), 14 Mad. 103; *Fakurudin Sahib* v. *Ackeni Sahib* (1880), 2 Mad. 197.

[7] This would include a *de facto*, as well as a *de jure* manager or superintendent, see *Muhammad Siraj-ul-haq* v. *Imam-ud-din* (1896), 19 All. 104, but would have no application to a mere trespasser.

or neglect of duty committed by such trustee,[1] manager, superintendent, or member of such committee [2] in respect of the trusts vested in or confided to them respectively, and the Civil Court may direct the specific performance of any act by such trustee, manager, superintendent, or member of a committee, and may decree damages and costs against such trustee, manager, superintendent, or member of a committee, and may also direct the removal of such trustee, manager, superintendent, or member of a committee."

This section is not confined to those endowments the nomination to which has been exercised by or had vested in the Board of Revenue under the above Regulations.[3] It is generally applicable to all public religious endowments, whenever created,[4] to which the above-named Regulations would have been applicable, if they had not been repealed to the extent that they have been repealed. In one case [5] it was held that this section, although in its terms it appears to be more general than the earlier sections, applies in fact only to the same religious trusts to which the rest of the Act applies.[6]

Against whom suit can be brought under Act.

Suits under this section can only be brought against the persons described in the section.[7] A suit under the section cannot be brought against a person to whom the manager has by a breach of trust transferred the property of the endowment.[8] The suit is personal and abates on the death of the defendant.[9]

Pauper suit.

The suit may be brought in *forma pauperis*.[10]

Further relief.

Provided that the cause of action be as specified in the section, it is competent to the Court in such suit to give such relief beyond the relief specified in the section, as may be ancillary to the relief specified, as, for instance, to appoint new trustees and frame a scheme,[11] or to make a

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[1] See *Elayalwar Reddiar* v. *Nambe-rumal Chettiar* (1899), 23 Mad. 298.

[2] The appointment of a Sivite to be trustee of a Vishnuvite temple is not a breach of trust by the committee, *Gandavathera Ayyangar* v. *Devanayya Mudali* (1883), 7 Mad. 222.

[3] *Sheoratan Kunwari* v. *Ram Pargash* (1896), 18 All. 227, at p. 231, differing from *Raghubar Dial* v. *Kesho Ramanuj Das* (1888), 11 All. 18 at p. 23; *Ganes Sing* v. *Ramgopal Sing* (1870), 5 B. L. R. App. 55, and cases *ante*, p. 585.

[4] *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223; *Saturluri Seetaramanuja Charyulu* v. *Nanduri Seetapati* (1902), 26 Mad. 166; *Dhurrum Singh Mohunt* v. *Kissen Singh* (1881), 7 Calc. 767, at p. 770; 9 C. L. R. 410, at p. 413; *Muhammad Siraj-ul-Haq* v. *Imam-ud-din* (1896), 19 All. 104; *Mahomed Athar* v. *Ramjan Khan* (1907), 34 Calc. 587; *Fakurudin Sahib* v. *Ackeni Sahib* (1880), 2 Mad. 197. See, however, *Jan Ali* v. *Ram Nath Mundul* (1881), 8 Calc. 32; 9 C. L. R. 433.

[5] *Kalee Churn Giri* v. *Golabi* (1878), 2 C. L. R. 128, at p. 131, following *Panchcowrie Mull* v. *Chumroolall* (1878), 3 Calc. 563; 2 C. L. R. 121.

[6] *Ante*, p. 585.

[7] See *ante*, p. 590, notes 6, 7.

[8] *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223.

[9] *Bhima Rout* v. *Dasarathi Dass* (1912), 40 Calc. 323.

[10] *Gurusami Chetti* v. *Krishnasami Naikar* (1901), 24 Mad. 419.

[11] *Narayana Ayyar* v. *Kumarasami Mudaliar* (1899), 23 Mad. 537; see,

declaration that property belongs to an institution,[1] or to deprive the defendants of the trusteeship or a right of puja,[2] or to restrain the superintendent from removing a holy book from the temple.[3]

The Court can, when directing the removal of a trustee, order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed.[4]

Nature of order.

An order under s. 14 should be mandatory, not merely prohibitory.[5]

Grounds of removal.

Mere error of judgment does not disqualify a member of a *devasthanam* committee. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member.[6] Cf. *ante*, p. 580.

The Act has no application to any suits other than those specified in s. 14,[7] as, for instance—

Suits to which Act has no application.

(*a*) A suit to establish a right to share in the management of a temple.[8]

(*b*) A suit brought by the *dharmakarta* of a temple and one of its worshippers to compel the defendant as heir of the late manager to make good out of the property inherited by him the deficiency in the Devasthanam funds caused by breach of trust and misappropriation by the late manager.[9]

(*c*) A suit for the removal of a *mohunt*, and for the appointment of the plaintiff in his place.[10]

(*d*) A suit by a temple officer for wrongful dismissal.[11]

(*e*) A suit for recovery of trust property [12] from a transferee even where the transaction amounted to a breach of trust.[13]

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however, *Protap Chandra Misser* v. *Brojonath Misser* (1891), 19 Calc. 275. There is a difference of opinion as to whether the Court has under this section power to appoint a trustee. In *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223, at p. 227, Sheppard, J., considered that such power did not exist. In *Sheoratan Kunwari* v. *Ram Pargash* (1892), 18 All. 227, at p. 232, the Allahabad High Court held that the Court had such power. It is submitted that on the removal of a manager or trustee in a suit brought under this section the person ordinarily entitled to nominate a successor does not lose his right, but that in case of his refusing or neglecting to exercise such right the Court would have to make an appointment.

[1] *Muhammad Jafar* v. *Muhammad Ibrahim* (1900), 24 Mad. 243.

[2] *Natesa* v. *Ganapati* (1890), 14 Mad. 103; in that case the suspension was withdrawn on terms.

[3] *Dhurrum Singh* v. *Kissen Singh* (1881), 7 Calc. 767; 9 C. L. R. 410.

[4] *Miyaji* v. *Ahmed Sahib (Sheikh)* (1908), 31 Mad. 212; *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (1887), 10 Mad. 375, at p. 508.

[5] *Dhurrum Singh* v. *Kissen Singh* (1881), 7 Calc. 767; 9 C. L. R. 410.

[6] *Tiruvengadath Ayyangar* v *Srinivasa Thathachariar* (1899), 22 Mad. 361.

[7] *Ante*, pp. 590, 591.

[8] *Agri Sharma Embrandri* v. *Vistnu Embrandri* (1866), 3 Mad. H. C. 198.

[9] *Y. K. K. A. M. R. C. Jeyangarulavaru* v. *Hati R. M. M. Durma Dossji (Sri)* (1868), 4 Mad. H. C. 2.

[10] *Kishore Bose Mohunt* v. *Kalee Churn Giree* (1874), 22 W. R. C. R. 364.

[11] *Amin Sahib (Syed)* v. *Ibram Sahib* (1868), 4 Mad. H. C. 112.

[12] *Mahalinga Rau* v. *Veraba Ghosami* (1881), 4 Mad. 157; *Virasami Nayudu* v. *Subba Rau* (1882), 6 Mad. 54.

[13] *Sivayya* v. *Rami Reddi* (1899), 22 Mad. 223.

(*f*) A claim as beneficiary under a deed of trust to a specified share which had been allotted to the claimant thereby.[1]

(*g*) A claim by the settlor claiming possession of the property on the ground that the trust had not been carried out.[2]

"The Act,[3] while it empowered persons to sue whose right to sue independently of the Act may be doubtful, did not deprive any one of the right to sue, which he may have independently of the Act."[4] Suit independent of the Act.

Section 15.—"The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary or a direct or immediate interest, or such an interest as would entitle the person suing to take any part in the management or superintendence of the trusts.[5] Any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any mosque, temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section."[6] Nature of interest entitling person to sue.

The Court has power to refer to arbitration matters in difference[7] in suits or proceedings instituted under the Act.[8] Reference to arbitration.

Section 18 (as amended by Act VII. of 1870) is as follows: "No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit." Application for leave to institute suit.

The Court on the perusal of the application shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and, if in the judgment of the Court there are such grounds, leave shall be given for its institution.

"If the Court shall be of opinion that the suit has been for the benefit of the trust, and[9] that no party to the suit is in Costs.

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[1] *Kalub Hossein (Hajee)* v. *Mehrum Beebee (Mussumat)* (1872), 4 N. W. P. 155.

[2] *Hidait-oon-nissa* v. *Afzul Hossein (Syud)* (1870), 2 N. W. P. 420.

[3] XX. of 1863.

[4] *Kalub Hossein (Hajee)* v. *Mehrum Beebee (Mussumat)* (1872), 4 N. W. P. 155, at p. 158; *Narayana Ayyar* v. *Kumarasami Mudaliar* (1899), 23 Mad. 537; *Puddolabh Roy* v. *Ram Gopal Chatterjee* (1882), 9 Calc. 133; 11 C. L. R. 33.

[5] See *Doyal Chund Mullick* v. *Keramut Ali* (1869), 12 W. R. C. R. 382.

[6] *Narayana Ayyar* v. *Kumarasami Mudaliar* (1899), 23 Mad. 537.

[7] But not the whole suit, *Karedla Vijayaraghava Perumalayya Naidu* v. *Yemavarapu Sitaramayya* (1902), 26 Mad. 361.

[8] Act XX. of 1863, ss. 16, 17. *Perumal Naik* v. *Saminatha Pillai* (1896), 19 Mad. 498.

[9] This does not mean "or:" *Nurendro Narain Roy* v. *Ishan Chunder Sen* (1874), 22 W. R. C. R. 22.

fault, the Court may order the costs or such portion as it may consider just to be paid out of the estate."

Verification.

An application for leave to sue should be duly verified and presented either by the applicant in person or by his pleader.[1]

Notice.

It is not necessary to give notice to the person whom it is intended to sue.[2]

When sanction is given to two persons one cannot sue alone.[3]

Inquiries.

A District Judge acting under s. 18 of Act XX. of 1863 can make inquiries, and is not bound to decide on a bare perusal of the application for leave to sue.[4]

If the suit instituted differs materially from the suit for which sanction was given, the plaint may properly be rejected.[5]

Appeal.

No appeal lies from an order giving or refusing leave made under s. 18.[6]

Suits in High Court.

It has been held that these sections do not apply to a suit brought under the ordinary original civil jurisdiction of a High Court,[7] and that therefore no sanction is necessary for such suit.

Court may require accounts of trust to be filed.

Section 19.—"Before giving leave for institution of a suit or after leave has been given, before any other proceeding is taken, or at any time when the suit is pending, the Court may order the trustee, manager, or superintendent or any member of a committee, as the case may be, to file in Court the accounts of the trust or such part thereof as to the Court may seem necessary."

Criminal proceedings.

Neither the Act nor any proceedings thereunder exclude the ordinary criminal law.[8]

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[1] *Amdoo Miyan* v. *Muhammad Davud Khan Bahadur* (1901), 24 Mad. 686.

[2] *Ibid.*

[3] *Venkatesha Malia* v. *Ramaya Hegade* (1914), 38 Mad. 1192.

[4] *Ramanathan Chethar* v. *Anantha-narayana Aiyar* (1909), 33 Mad. 412.

[5] *Srinivasa* v. *Venkata* (1887), 11 Mad. 148.

[6] *Civil Revision Petition* 101 *of* 1882, 10 Mad. 98, note; *In re Venkateswara* (1886), 10 Mad. 98; *Kaviraja Sundara Murtiya Pillai* v. *Nalla Naikan Pillai* (1866), 3 Mad. 93; *Kalub Hossein (Hajee)* v. *Ali Hossein* (1872), 4 N. W. P. 3; *Delrus Banoo Begum* v. *Abdur Ruhman (Hadjee)* (1874), 21 W. R. C. R. 368; *Protap Chandra Misser* v. *Brojonath Misser* (1891), 19 Calc. 275; *Kazem Ali* v. *Azim Ali Khan* (1891), 18 Calc. 382; *Mozaffer Ali* v. *Hedayet Hossain* (1907), 34 Calc. 584. As to an appeal from an order for costs, see *Ramakissoor Dossji* v. *Sriranga Charlu* (1898), 21 Mad. 421.

[7] *Annasami Pillai* v. *Ramakrishna Mudaliar* (1900), 24 Mad. 219, at pp. 231, 232; see *Panchcowrie Mull* v. *Chumroolall* (1878), 3 Calc. 563; 2 C. L. R. 121. If the case comes within the terms of the section, and the endowment be one to which the Act applies, there seems to be no reason why the section should not apply even to a suit brought in a Presidency town.

[8] (1876), 1 Mad. 55. Act XX. of 1863, s. 20.

Section 21.—"In any case in which any land or other property has been granted for the support of an establishment partly of a religious and partly of a secular character, or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses the Board of Revenue, before transferring to any trustee, manager, or superintendent, or to any committee of management appointed under this Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses, and what portion shall be transferred to the superintendence of the trustee, manager, or superintendent, or of the committee, and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said trustee, manager, or superintendent, or of the committee, and made payable to the said Board or the local agents for secular uses as aforesaid. In every such case the provisions of this Act shall take effect only in respect to such land and other property as may be so transferred."

Endowments partly for religious and partly for secular purposes.

Section 22.—"Except as provided in this Act, it shall not be lawful for any Government in India, or for any officer of any Government in his official character to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any mosque, temple, or other religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such mosque, temple, or other religious establishment, or to nominate or appoint any trustee, manager, or superintendent thereof, or to be in any way concerned therewith." [1]

Government not to hold charge of property for support of mosque, temple, etc.

There is also power given by the Charitable Endowments Act, 1890,[2] to the Local Government on the application of the person acting in the administration of a trust for a charitable purpose, or his executor or administrator or of a person proposing to apply property in trust for such a purpose, to vest the property in the Treasurer of Charitable Endowments; [3] but

Charitable Endowments Act.

[1] Such appointment, if made, is void, see *Mahomed* v. *Ganapati* (1889), 13 Mad. 277.

[2] Act VI. of 1890.

[3] *Ibid.*, s. 6.

such treasurer cannot, as such, act in the administration of the trust.[1]

Coorg.

As to the management of temple funds in Coorg, see the Coorg Temple Funds Management Regulation, 1892 (IV. of 1892).

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[1] Act VI. of 1890, s. 8.

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